(12)

No. 91-1958-CFX
Status: GRANTED

Title: Donald L. Helling, et al., Petitioners
v.
Willima McKinney

Docketed:
June 1, 1992

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Higgins,Kevin G., Cathcart,Anne B.

Counsel for respondent: Hitchcock,Cornish F., McKinney,William

Entry	Date	Note	Proceedings and Orders
1	Jun 1 1992	G	Petition for writ of certiorari filed.
2	Jun 2 1992		Brief of respondent Willliam McKinney in opposition filed.
3	Jun 9 1992	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Jun 10 1992		DISTRIBUTED. June 26, 1992
5	Jun 17 1992	X	Brief amici curiae of Hawaii, et al. filed.
6	Jun 25 1992	X	Reply brief of petitioner filed.
7	Jun 29 1992		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Jun 29 1992		Petition GRANTED.
			**********
10	Aug 3 1992		Order extending time to file brief of petitioner on the merits until August 27, 1992.
11	Aug 27 1992		Brief amici curiae of Hawaii, et al. filed.
13	Aug 27 1992		Brief amicus curiae of United States filed.
14	Aug 27 1992		Brief of petitioners Donald L. Helling, et al. filed.
15	Aug 27 1992		Joint appendix filed.
18	Sep 15 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Sep 22 1992		Order extending time to file brief of respondent on the merits until October 14, 1992.
19	Oct 5 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
20	Oct 13 1992		LODGING by respondent. Scientific articles on passive smoking.
21	Oct 13 1992		Brief of respondent William McKinney filed.
22	Oct 14 1992		Brief amici curiae of ACLU, et al. filed.
23	Oct 20 1992		Record filed.
		*	Partial proceedings United States Court of Appeals, Ninth Circuit.
24	Nov 4 1992		Record filed.
		*	Original proceedings United States District Court of Nevada.
25	Nov 20 1992		SET FOR ARGUMENT WEDNESDAY, JANUARY 13, 1993.(1ST CASE).
27	Nov 20 1992	X	Reply brief of petitioner filed.
26	Nov 23 1992		CIRCULATED.
28	Jan 7 1993		LODGING by petitioners. Orders in three cases and four Nevada Prisons' Directives. Circulated.
29	Jan 12 1993		LODGING by respondent. One copy of EPA Report of January

2 pp

No. 91-1958-CFX

Entry	Date	Note	Proceedings and Orders
			7, 1993 entitled "Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders."
30	Jan 13 1993		ARGUED.

(D)

No. 91-1958

Supreme Court, U.S.
FILED
JUN 1 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,

Petitioners,

v.

WILLIAM McKINNEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER, IN THE ABSENCE OF ANY MEDICAL PROBLEMS, A STATE PRISON INMATE STATES AN EIGHTH AMENDMENT CLAIM FOR CRUEL AND UNUSUAL PUNISHMENT BY ALLEGING COMPELLED EXPOSURE TO SECONDARY TOBACCO SMOKE POSES AN UNREASONABLE RISK TO HIS HEALTH; AND WHETHER THE COURT OF APPEALS PROPERLY ADDRESSED THIS ISSUE ON REMAND FROM THE UNITED STATES SUPREME COURT.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,*

Petitioners,

v.

WILLIAM MCKINNEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

*The named petitioners have succeeded Pat Anderson, H. L. Whitley, George Sumner and John Nye, respondents-appellees below, in office. The named petitioners are substituted as parties to this action in accordance with Supreme Court Rule 35(3).

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,*

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WILLIAM MCKINNEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COME NOW DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN[1], and Frankie

---

[1] Petitioner Helling, successor in office to Pat Anderson; petitioner Ignacio, successor in office to Harol

(continued...)

Sue Del Papa, the Attorney General of the State of Nevada, and file this petition for writ of certiorari seeking to vacate the Order, on Remand, of the Ninth Circuit Court of Appeals.

OPINIONS AND JUDGMENTS BELOW

The Order, on remand, of the Ninth Circuit Court of Appeals, was filed March 27, 1992, and is reproduced in Appendix A.

The Amended Judgment of the United States Supreme Court, which granted petitioners' Petition for Writ of Certiorari, vacated the Ninth Circuit's judgment and remanded the case for reconsideration, was entered on October 15, 1991. It is reproduced in Appendix B.

---

[1](...continued)
Whitley; petitioner Angelone, successor in office to George Sumner; and petitioner Horn, successor in office to John Nye, have been substituted as parties. See Sup. Ct. R. 35(3). William McKinney, respondent in this Court, and petitioner-appellant below, will be referred to as McKinney.

The Opinion of the United States Court of Appeals for the Ninth Circuit was filed on February 1, 1991, and is reproduced in Appendix C. McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991). The Order Entering Judgment in Favor of Defendants following trial in the United States District Court for the District of Nevada, entered on October 27, 1989, is reproduced in Appendix D.

JURISDICTIONAL STATEMENT

This case arises from a civil rights action filed under 42 U.S.C. 1983 in the federal district court by William McKinney, an inmate. A jury trial was conducted on October 2 and 3, 1989, before the U.S. Magistrate. Following plaintiff's case in chief, defendants' motion for a directed verdict was granted by the U.S. Magistrate. The district court's Order Entering Judgment in Favor of Defendants was entered on October 27, 1989 [Appendix

D]. Plaintiff filed his Notice of Appeal on October 22, 1989 [Appendix E].

The Opinion of the Ninth Circuit Court of Appeals was filed February 1, 1991 [Appendix C]. Appellees' Petition for Rehearing and Suggestion for Rehearing En Banc, filed on March 1, 1991, was denied by the Court of Appeals on May 14, 1991.

A Petition for Writ of Certiorari was filed on August 9, 1991, by petitioners herein. (Case No. 91-269). The Petition was granted by the United States Supreme Court pursuant to an Amended Judgment entered on October 15, 1992, vacating the judgment of the Ninth Circuit and remanding the case for reconsideration in light of Wilson v. Seiter, 111 S. Ct. 291 (1991).

Following remand, the Ninth Circuit Court of Appeals filed an Order affirming its earlier decision, and remanding the case to the United States District Court.

McKinney v. Anderson, 959 F.2d 853 (1992) [Appendix A].

The jurisdiction of this Court is invoked under section 1254(1) of Title 28 to the United States Code.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory provision is involved in this case: Nevada Revised Statute § 202.2491. [Appendix F].

The Eighth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Respondent William McKinney (hereinafter "McKinney") a convicted murderer, filed a civil rights complaint on January 28, 1987, alleging he was subjected to cruel and unusual punishment in violation of the Eighth Amendment, from having been involuntarily exposed to other inmates' tobacco smoke. He sought both damages

. . .

and injunctive relief, claiming his health had been damaged.

The parties filed their proposed joint pretrial order on December 7, 1988. The agreed-upon issues of law for trial relevant to this appeal were:

> 1. Have the defendants been deliberately indifferent to the serious medical needs of McKinney, and have they therefore violated his right to be free from cruel and unusual punishment?
>
> 2. Does McKinney have a constitutional right to be housed in a smoke-free environment?
>
> . . .
>
> 5. Is McKinney entitled to injunctive relief prohibiting the defendants from housing him in any wing of any unit which also houses smokers?
>
> . . .

Following a two-day trial before the U.S. Magistrate, defendants made a motion for a directed verdict at the close of McKinney's case-in-chief, which was granted. In the Order Entering Judgment in Favor of Defendants, the U.S. Magistrate

found that, as a matter of law, there is no constitutional right to be housed in a smoke-free environment, relying on Gorman v. Moody, 710 F. Supp. 1256 (D. Ind. 1989) and Beeson v. Johnson, 668 F. Supp. 498 (E.D.N.C. 1987). [Appendix D].

The U.S. Magistrate specifically found McKinney had failed to show either a serious medical need or deliberate indifference to it, using the standard applied in Gorman, citing Simpson v. Broglin, 612 F. Supp. 1162 (N.D.Ind. 1985), which required the plaintiff to show that prison officials intentionally exposed him to a known risk of harm and actually intended to harm him [Appendix D]. (Emphasis added)

McKinney raised various issues on appeal to the Ninth Circuit. The issue relevant to this Petition was:

> 1. Whether the U.S. Magistrate Erred in Granting Defendants' Motion for a Directed Verdict on the Issue of Whether

McKinney is Entitled to a Smoke-free Environment in Prison.

The Ninth Circuit held that even in the absence of health problems, an inmate states an Eighth Amendment claim by alleging exposure to levels of secondary tobacco smoke which pose an unreasonable risk to his health. The Ninth Circuit ordered the case remanded to the district court for further proceedings to allow McKinney to present evidence regarding his exposure to secondary tobacco smoke and a determination as to whether such exposure created an unreasonable risk of harm to his health. [Appendix A].

Following the Ninth Circuit's denial of a Petition for Rehearing and Rehearing En Banc, defendants filed their first Petition for Writ of Certiorari to this Court. See Case No. 91-269. This Court granted the Petition, vacating the Ninth Circuit Court's judgment and remanding

the case for reconsideration in light of Wilson v. Seiter. [Appendix B].

On remand, the Ninth Circuit affirmed its earlier decision that

> . . . . it is cruel and unusual punishment to house a prisoner in an environment that exposes him to environmental tobacco smoke ("ETS") at such levels and under such circumstances that it poses an unreasonable risk of harm to his health. McKinney, 924 F.2d at 1503-1504.

The Ninth Circuit further

> ". . . . reversed and remanded for further proceedings on McKinney's Eighth Amendment claim to allow him an opportunity to present evidence on the level and degree of his exposure to ETS and on whether that degree of exposure is sufficient to create an unreasonable risk of harm to his health. Id. at 1509.

In view of the Ninth Circuit's decision on remand, defendants have filed this second Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

This Petition should be granted to resolve directly conflicting opinions among at least four circuit courts of

appeal (Ninth, Tenth, Fifth and Seventh), and a number of federal district courts, on the issue of whether an inmate states a claim for cruel and unusual punishment under the Eighth Amendment by alleging he has a right to be free from compelled exposure to secondary tobacco smoke, which poses a health risk, even where no related medical problems exist.

This Petition should be granted because when this issue was remanded following the United States Supreme Court's granting of defendants' first petition, the Ninth Circuit, in affirming its earlier decision, did not properly interpret and apply the Wilson v. Seiter decision.

This Petition should be granted because a decision on this issue will have a far-reaching impact on (1) the cost of operating state correctional facilities; (2) the ability of legislatures and prison administrators to effectively manage

and control state prison populations; and (3) the cost to the public of defending against inmate civil rights lawsuits.

The major differences among the circuit and district court opinions focus on the extent to which administrators and state legislatures must have discretion to manage their state prison facilities; the perceived evolving community standards of decency; and whether a potential future risk to an inmate's health falls within the constitutional prohibition against cruel and unusual punishment.

This split among the federal courts must be resolved to provide consistent guidelines for prison authorities, who daily contend with limited cell space and a myriad of security and classification concerns. Permitting inmates to prevail on an Eighth Amendment claim on the grounds that exposure to others' tobacco smoke "may" create a possible future

health risk effectively takes from prison officials the discretion and flexibility needed to properly and safely classify and house inmates. Compelling prison officials to classify felons according to smoking or non-smoking preference invites serious security, housing and inmate management problems.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT ERRED IN HOLDING AN INMATE'S COMPELLED EXPOSURE TO SECONDARY TOBACCO SMOKE POSED A HEALTH RISK FOR WHICH HE COULD STATE A CLAIM FOR CRUEL AND UNUSUAL PUNISHMENT.

A. The Ninth Circuit Decision Conflicts With Recent Decisions Of Other Circuits On This Issue

1. Ninth Circuit:

Prior to McKinney v. Anderson, the Ninth Circuit held an inmate with throat cancer stated an Eighth Amendment claim where he alleged his placement in a cell with a smoker endangered his health. Franklin v. State, 662 F.2d 1337, 1347 (9th Cir. 1981):

> If these conditions, however, were as threatening to Franklin's health as he alleged and if they were the result of deliberate indifference on the part of the prison officials, then Franklin arguably has alleged cruel and unusual punishment under the Eighth Amendment. (Emphasis added)

Now, in the wake of the Ninth Circuit's order on remand in McKinney v. Anderson, an inmate need not present any evidence regarding his health. He need only allege that his exposure to others' tobacco smoke is at a level which creates an unreasonable risk of harm to his health, and that prison officials were deliberately indifferent to this risk.

2. Tenth Circuit:

a. The Tenth Circuit recently decided Clemmons v. Bohannon, 956 F.2d 1523 (10th Cir. 1992) [Clemmons II], following a rehearing and rehearing en banc in Clemmons v. Bohannon, 918 F.2d 858 (10th Cir. 1990) [Clemmons I]. The Clemmons I court had held an inmate without specific

health problems stated an Eighth Amendment claim by alleging his exposure to secondary tobacco smoke created an unreasonable risk to his health.

Following rehearing, and after this Court's decision in Wilson v. Seiter, the Tenth Circuit vacated its decision in Clemmons I, and affirmed the district court's decision. The Court stated, in Clemmons II:

> In spite of our concern that exposure to ETS is a potential health hazard, we cannot agree that exposure to ETS rises to the level of an Eighth Amendment violation in this case because the record reveals absolutely no evidence that Clemmon's health has been adversely affected by the cigarette smoke produced by his cellmate. Further, Clemmons has utterly failed to demonstrate a factual dispute regarding the defendants' deliberate indifference to serious medical needs. . . . (Emphasis added)

(Clemmons II, supra, at 1525)

The Tenth Circuit further explained:

> Neither the Supreme Court nor this court has ever held that a potential, distant harm to a prisoner's health is a serious medical need. .

> . "[C]onditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional" even if those conditions are sometimes "restrictive and even harsh." Rhodes, 452 U.S. at 347. Clemmon's complaint regarding ETS is simply of a lesser magnitude than those cases that have found an Eighth Amendment violation due to deliberate indifference to serious medical need. (Emphasis added)

Id., at 1527-1528.

The Court considered Clemmons' claim that prison officials were deliberately indifferent in 1986 and 1987 by placing him in cells with inmates who smoked:

> Further, it is unlikely the defendants could have been deliberately indifferent regarding ETS exposure in prison cells during 1986 and 1987 based on the state of knowledge about ETS at that time. In light of Clemmons's admissions, we cannot infer from the single fact that Clemmons had smoking cellmates that the prison officials deliberately intended to expose Clemmons to carcinogens.

b. In Kensell v. State of Oklahoma, 716 F.2d 1350, 1351 (10th Cir. 1983), the court rejected a state employee's

. . .

claim he had a right to a smoke-free working environment:

> The intrusions upon the plaintiff's person resulting from working with fellow servants who smoke is a far cry from forcible injections of mind altering drugs and assaults committed by police or prison officials to intimidate or punish persons in their custody. This is not a case in which governmental officers are abusing power they possess only because the government is sovereign. . . the United States Constitution does not empower the federal judiciary, upon the plaintiff's application, to impose no-smoking rules in the plaintiff's workplace. To do so would support the most extreme expectations of the critics who fear the federal judiciary as a superlegislature promulgating social change under the guise of securing constitutional rights. . . . (Emphasis added)

3. Seventh Circuit:

In Steading v. Thompson, 941 F.2d 498 (7th Cir. 1991), the Court considered the claim of an asthmatic inmate that his exposure to secondary tobacco smoke was cruel and unusual punishment. The Seventh Circuit considered this issue following the decision in Wilson v. Seiter,

and determined there was no evidence to show any culpable state of mind on the part of defendants. The Court stated:

> Secondary tobacco smoke is common in offices, restaurants, and other public places throughout the United States and the rest of the world. No one supposes that restauranteurs who allow smoking are subjecting their other patrons to "punishment", or desire to harm them. The guards and administrators who breathe smoky air in the prison are not punishing themselves. No one would suppose, either, that the gentlemen tobacco farmers who wrote and adopted the eighth amendment could have conceived of smoke as punishment. Evidence since 1791 presents tobacco in a different light, but debate persists about how severe the effects of secondary smoke may be. (Emphasis added)

Steading, at p. 500.

The Court noted that even if prison officials intended Steading to experience discomfort, this does not equate to punishing him. The Court pointed out that ". . . . prisoners allergic to the components of tobacco smoke, or who can attribute their serious medical conditions to smoke, are entitled to appropriate

medical treatment, which may include removal from places where smoke hovers." (Id., at p. 500). But, the Court continued, Steading's request to ban smoking from Illinois' prisons fails under the Wilson standard.

4. Fifth Circuit:

In Wilson v. Lynaugh, 878 F.2d 846 (5th Cir. 1989), the court declined to consider appellant's previously litigated Eighth Amendment claim based on new studies regarding environmental tobacco smoke. The Wilson court cited with approval from Gorman v. Moody:

> "it is also relevant to our Eighth Amendment analysis that 'society cannot yet completely agree on the propriety of nonsmoking areas and a smoke-free environment.'"

B. The Ninth Circuit's Decision Conflicts With United States District Court Cases.

1. The U.S. District Court for the Northern District of Indiana held, in Gorman v. Moody, 710 F.Supp. 1256, 1262

(N.D. Ind. 1989), that where a plaintiff did not allege a serious medical condition exacerbated by exposure to tobacco smoke, no Eighth Amendment claim is stated.

> This court believes that smoking is a societal issue best resolved by the executive and legislative branches of government. The operation of our correctional facilities "is peculiarly the province of the legislative and executive branches of our government, not the judicial." [citations omitted]. . . Whether to provide smoke-free areas must be left to the discretion of legislatures and prison officials who must operate the prisons to the best of their abilities, and those officials must make those decisions after a consideration of all factors relevant to the particular institution and the care and well-being of all inmates. (Emphasis added)

2. In Caldwell v. Quinlan, 729 F.Supp. 5 (D.D.C. 1989), the U.S. District Court for the District of Columbia granted the Director of the Federal Bureau of Prisons' motion to dismiss a lawsuit brought by an inmate claiming the Bureau's failure to protect him from sec-

ondary tobacco smoke or keep him segregated from smokers violated his Eighth Amendment rights:

> This Court is unable to find that defendant's smoking policy involves a protected liberty interest. Individuals do not have a constitutional right to be free from passive smoke [citations omitted]. Nor does the Bureau of Prisons' smoking policy somehow create a liberty interest to a smoke-free prison term. It provides only that a Warden may implement a smoking policy at his discretion. . . . (Emphasis added)
>
> The Constitution does not mandate comfortable prisons, and prisons which house persons convicted of serious crimes cannot be free of discomfort.

3. The U.S. District Court for the Eastern District of North Carolina decided Beeson v. Johnson, 668 F.Supp. 498 (E.D.N.C. 1987), which involved an inmate with asthma and respiratory problems who complained of exposure to heavy secondary cigarette smoke despite the prison doctor's indication he should be in a non-smoking area. The court held that in

these circumstances, where related health problems exist, plaintiff could state an Eighth Amendment claim.

4. The U.S. District Court for the District of New Hampshire, in Avery v. Powell, 695 F.Supp. 632, 639 (D.N.H. 1988), held:

> exposure to ETS is not merely discomforting and that conditions of plaintiff's confinement may constitute punishment cognizable under the Eighth Amendment.
>
> . . .
>
> the decision by defendants to maintain plaintiff in a dangerous [non-smoke-free] environment may be construed as a deliberate decision which is not reasonably related to any proper governmental objective, and thus it may deprive plaintiff of his liberty rights without due process. Accordingly, plaintiff states a claim under the Fourteenth Amendment. . . .

5. In Lee v. Carlson, 645 F.Supp. 1430, 1438 (S.D.N.Y. 1986), the Court held an inmate did not state an Eighth Amendment claim for failure to keep him from being exposed to tobacco smoke

. . . . because there is no allegation in the complaint, and nothing in the record, to indicate that plaintiff was being exposed to smoke in violation of any then existing statute or regulation, or that any of the other defendants acted unreasonably under the circumstances in exposing plaintiff to tobacco smoke.

6. The Court in West v. Wright, 747 F.Supp. 329, 332 (E.D.Va. 1990), rejected an inmate's claim that failure to put him in a smoke-free single cell constituted deliberate indifference to his serious medical needs:

> Here, the Court concludes only that where plaintiff does not suffer from any preexisting medical condition that is aggravated by environmental tobacco smoke, and where defendants have implemented significant safeguards to protect nonsmokers from environmental tobacco smoke, the factual circumstances do not support a claim of cruel and unusual punishment. (Emphasis added)

C. The Ninth Circuit Erred In Holding Exposure To Environmental Tobacco Smoke May Violate An Inmate's Eighth Amendment Rights.

. . .

. . .

1. The Court Erred In Determining The Evolving Standards Of Decency.

The Ninth Circuit on remand, affirmed its earlier McKinney decision, in which it relied on reports from the Surgeon General and Environmental Protection Agency regarding the association between environmental tobacco smoke and lung cancer, and on its observation that a number of prisons and jails were "beginning to take steps to restrict or ban smoking." [Appendix C].

The Ninth Circuit also cited numerous state statutes regulating smoking in public buildings, and specifically referred to Nevada Revised Statute §202.249.

The court, however, did not appear to take into account that a number of states specifically exempt prison facilities from smoking regulations. (See Nev. Rev. Stat. § 202.249, Appendix F). This is the community standard in the State of

Nevada with respect to the application of its laws restricting smoking in public buildings. There are a number of other states with statutes regulating smoking in public buildings which specifically exempt correctional facilities.

Still other states' restrictions on smoking are limited to areas open to the public, which also does not include inmate housing. As Judge Tacha stated in his dissent in Clemmons I, supra at p. 872, "a review of the state legislation cited by the majority as forbidding or restricting smoking reveals that the vast majority of these laws are limited to public places, which are statutorily defined so as to exclude prisons."

Consequently, although the trend in society is toward the protection of the rights of non-smokers in public places, such protections have not necessarily been extended to prisons in deference to

the unique problems associated with housing inmates. This is the community standard of decency which should have been recognized by the Ninth Circuit.

2. The Eighth Amendment Claim As Determined By The Court Was Not The Issue On Appeal And Should Not Have Been Decided In The Absence Of Briefing By The Parties

In granting defendants' motion for a directed verdict against McKinney, the U.S. Magistrate found that

> McKinney failed to produce any evidence to support his claim that the defendants were deliberately indifferent to his serious medical symptoms... [and] as a matter of law, McKinney had no constitutional right to be free of secondary cigarette smoke. (Opinion, at p. 3, Appendix C). (Emphasis added)

The Ninth Circuit panel stated:

> The magistrate framed the issue in all-or-nothing terms: either McKinney had a constitutional right to a completely smoke-free environment, or he had only a constitutional right to medical attention for proven serious medical needs. By so doing, the magistrate excluded a valid eighth amendment claim lying between those two extremes: that compelled exposure to levels

> of ETS that pose an unreasonable risk of harm to human health constitutes cruel and unusual punishment. (Opinion, at p.3, Appendix C).

The Ninth Circuit erred in two respects. First, the magistrate did not frame the issues to be tried. The parties determined the issues in their proposed joint pre-trial order, which were whether, under the Eighth Amendment, defendants had been deliberately indifferent to McKinney's serious medical needs, and/or whether McKinney had a constitutional right to be housed in a smoke-free environment. Thus, the magistrate merely ruled on the issues which the parties had agreed upon for trial.

Second, the question on appeal was not whether McKinney's constitutional rights had been violated by compelled exposure to secondary tobacco smoke, but rather was whether the magistrate abused her discretion in granting the defendants'

motion for a directed verdict. Under existing law, the U.S. Magistrate's ruling was entirely correct and was not an abuse of discretion. The Ninth Circuit itself did not state that any abuse of discretion occurred.

It was inappropriate for the Court of Appeals to consider an issue not tried, nor raised on appeal, nor briefed by the parties. As stated in Matter of Texas Mortgage Services Corporation, 761 F.2d 1068, 1073 (5th Cir. 1985),

> Rule 28(a)(4) has been construed as a mandate that the brief of the appellant contain a statement of the issues presented for review, and an argument portion which analyzes and supports those contentions. 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure, §3974, at 421 (1977). As a consequence, it has been stated that issues "not raised or argued in the brief of the appellant may be considered waived and thus will not be noticed or entertained by the court of appeals. Id. at 421 n. 1.

In F&H Inv. Co. v. Sackman-Gilliland Corp., 728 F.2d 1050 (8th Cir. 1984), the

court declined to reach an issue neither briefed nor discussed at oral argument by either party:

> Due to plaintiff's notice of appeal and the other indications discussed above, this appeal was briefed and argued on the assumption that plaintiff did not appeal the grant of judgment notwithstanding the verdict on the breach of fiduciary duty claim. For this court to reach the issue would prejudice defendant. Therefore, we find that the issue has not been preserved for appeal. See Fed.R.App.P. 3(c), 9 Moore's Federal Practice § 203.18 (2 Ed. 1983). (Emphasis added)

The Ninth Circuit inappropriately chose to establish its own views on the desirability of exposure to secondary tobacco smoke without any notice to the parties and at the very least should have asked the parties to submit additional briefing on the point. Then, Petitioners could have provided evidence of the difficulties in classifying and housing inmates within the limitations of budget, facilities, and security concerns. Petitioners could have advised the court of

the accommodations which are made for both smoking and non-smoking inmates.

Petitioners could have presented reports and studies which refuted or at least seriously questioned the conclusions reached by the authorities upon which the Ninth Circuit chose to rely.

Because the issue on appeal was not whether exposure to secondary tobacco smoke was cruel and unusual punishment, but instead it was whether the U.S. Magistrate had abused her discretion in ruling that McKinney had no right to a smoke-free environment, the parties had no opportunity to argue the issue as framed by the Ninth Circuit.

D. The Ninth Circuit Did Not Properly Interpret And Apply Wilson On Remand.

1. The Subjective "Deliberate Indifference" Requirement Was Not Met By McKinney At Trial, And He Is Not Entitled To A Re-trial.

In Wilson v. Seiter, supra, this Court stated an inmate challenging the condi-

tions of his confinement as cruel and unusual punishment must show prison officials acted with deliberate indifference.

This Court has consistently held that the Eighth Amendment prohibition against cruel and unusual punishment prohibits only the unnecessary and wanton infliction of pain. The fact that a subjective inquiry must be made, in addition to the objective part of an Eighth Amendment claim, is not by any means a new requirement.

That Rhodes had not eliminated the subjective component was made clear by our next relevant case, Whitley v. Albers, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986) . . . .

> "After incarceration, only the unnecessary and wanton infliction of pain...constitutes cruel and unusual punishment. To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety...It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the

> conduct prohibited by the Cruel and Unusual Punishment Clause...Id., at 319). . . .
>
> These cases mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment . . . .

Wilson, at p. 2324, citing Whitley v. Albers, supra.

> Having determined that Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind, it remains for us to consider what state of mind applies in cases challenging prison conditions . . . .

Wilson, at p. 2326.

The Court explained in Wilson that a claimant has always been required to establish a mental state where cruel and unusual punishment has been alleged. The Court then decided that the appropriate standard was that of deliberate indifference.

> "Whether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his

> medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in Estelle." [quoting from LaFaut v. Smith, 834 F.2d 389, 391-392 (CA4 1987).

Wilson, at p. 2327.

In the Order Entering Judgment in Favor of Defendants [Appendix D], the U.S. Magistrate specifically stated:

> Based upon the testimony adduced by McKinney during his presentation of his case, he has failed to show either a serious medical need or deliberate indifference to it. . . . (Order, at p. 4).
>
> There was no evidence presented of personal involvement by any of the Defendants, nor in accordance with the test announced in Beeson above, was there any indication that any of the Defendants intentionally chose to inflict harm upon the Plaintiff. (Order, at p. 6).

Without a showing by McKinney of any personal involvement or deliberate conduct on the part of Petitioners, he cannot prevail on his Eighth Amendment claim. McKinney has had his day in court, and was unable to present evidence to support his claim. The U.S. Magistrate properly granted defendants' motion for directed verdict at the close of McKinney's case. It is not now appropriate for the Ninth Circuit to give McKinney a "second shot" at presenting his evidence. Such a decision in effect ignores the factual findings of the U.S. Magistrate.

2. The Objective Component Of The Eighth Amendment Claim Was Not Met By McKinney

The Wilson court stated, at p. 2324:

> The Constitution, we said "does not mandate comfortable prisons," id., at 349, and only those deprivations denying "the minimal civilized measure of life's necessities," id., at 347, are sufficiently grave to form the basis of an Eighth Amendment violation. [quoting from Estelle v. Gamble, 429 U.S. 97 (1976)].

Petitioners submit the Eighth Amendment prohibition against cruel and unusual punishment does not embrace the concept of an environment in prison which is free from varying levels of secondary tobacco smoke. Such an environment does

not exist in the real world, save for those exceptions primarily carved out by state legislatures which are generally applicable to certain buildings open to and used by the general public. McKinney is not entitled to a prison cell meeting his standards of comfort, and his occasional exposure to secondary tobacco smoke does not deprive him of "the minimal civilized measure of life's necessities."

The mere existence of a potential health risk does not constitute cruel and unusual punishment. If it did, then inmates would be filing civil rights complaints every time they were exposed to another inmate with a cold. The Ninth Circuit stated on p. 14 of its Opinion [Appendix C]:

> "while not every deviation from ideally safe conditions may amount to a constitutional violation, we ruled [in Hoptowit v. Spellman] that conditions of confinement that seriously threaten the health and

> safety of the inmates are unconstitutional."

McKinney made no showing at trial that his health or safety had been seriously threatened by exposure to secondary tobacco smoke. That was sufficient for the U.S. Magistrate to have granted defendants' motion for a directed verdict. The Ninth Circuit acted with undue haste in ruling that an inmate's exposure to secondary tobacco smoke states an Eighth Amendment Claim, especially where defendants never had the opportunity to present their own evidence to contest Mckinney's legally insufficient facts. In the absence of any compelling evidence subjected to an evidentiary contest, McKinney has not stated, much less proven an Eighth Amendment claim.

The Tenth Circuit Court stated in Clemmons II:

> "The role of this Court is not to spearhead and define society's evolving standard of decency.

Rather, this Court must interpret and apply the Constitution of the United States. When the dissent attempts to create new standards of decency based on reports by the Environmental Protection Agency and the Surgeon General, it ceases to interpret the Constitution. Instead of applying constitutional standards, the dissent's reasoning mandates a public health ideal for all of society. See Rhodes, 452 U.S. at 351, 101 S.Ct. at 2401.

"In assessing claims that conditions of confinement are cruel and unusual, courts must bear in mind that their inquiries 'spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility.'" (quoting Bell v. Wolfish, 441 U.S. 520, 539 (1979).

Clemmons II, supra, at 1529.

Tenth Circuit Court Judge Tacha, in his eloquent dissent in Clemmons I, stated "[A] constitutional right to a smoke-free cell would have no limits and it would open a Pandora's box of constitutional challenges for prison administrators," and there is

> . . . . no justification whatsoever for making the rights of non-smoking prisoners paramount over the myriad of health and security concerns that prison officials must confront and balance daily. At worst, the majority opinion lays the groundwork for a constitutional burden that will be impossible for prison authorities to carry, ... At best, the majority imposes an unwarranted and unprecedented constraint on the discretion of prison administrators to balance potential versus immediate health and safety concerns.

Clemmons I, supra at 873.

CONCLUSION

For the reasons discussed above, the State respectfully requests this Court grant certiorari, receive briefs on the merits, and ultimately reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted.

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APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM MCKINNEY,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 89-16589
vs.	)	D.C. No.
PAT ANDERSON; CAROL PLOYHAR; H.L. WHITLEY; GEORGE W. SUMNER; JOHN NYE,	)	CV-N-87-36-ECR
	)	ORDER
	)	
Defendants-Appellees.	)	

On Remand from the
United States Supreme Court

Filed March 27, 1992

Before: James R. Browning,
Harry Pregerson and Stephen S. Trott,
Circuit Judges.

ORDER

William McKinney, a Nevada state prisoner, filed a pro se civil rights complaint under 42 U.S.C. § 1983. This court affirmed in part, reversed in part,

and remanded. McKinney v. Anderson, 924 F.2d 1500 (9th Cir.), vacated and remanded sub nom., Helling v. McKinney, 112 S.Ct. 291 (1991). Anderson appealed our decision. The Supreme Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of its decision in Wilson v. Seiter, 111 S.Ct. 2321 (1991). Helling v. McKinney, 112 S.Ct. 291 (1991). We reinstate our decision and remand for further proceedings consistent with it and with Seiter.

In McKinney we held that it is cruel and unusual punishment to house a prisoner in an environment that exposes him to environmental tobacco smoke ("ETS") at such levels and under such circumstances that it poses an unreasonable risk of harm to his health. McKinney, 924 F.2d at 1503-1504. We reversed and remanded for further

proceedings on McKinney's Eighth Amendment claim to allow him an opportunity to present evidence on the level and degree of his exposure to ETS and on whether that degree of exposure is sufficient to create an unreasonable risk of harm to his health. Id. at 1509. Although we held that McKinney had stated a cause of action for injunctive relief, we found that he was not entitled to damages on that cause of action because the defendants were entitled to qualified immunity as a matter of law. Id. We also held that Nevada's anti-smoking law applies to prison raries and remanded for further equitable proceedings. Id. at 1510.

We affirmed the directed verdict for defendants' on the issue of their alleged deliberate indifference to McKinney's serious existing medical needs. Id. at 1511. We also affirmed the denial of

McKinney's motion for a trial transcript to be produced at the Government's expense. Id. at 1512.

On remand from the Supreme Court we are asked to consider the effect of Seiter on McKinney. The issue in Seiter was "whether a prisoner claiming that conditions of confinement constitute cruel and unusual punishment must show a culpable state of mind on the part of prison officials and, if so, what state of mind is required." Seiter, 111 S.Ct. at 2322. The Court held that "[i]f the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify" as a violation of the Eighth Amendment. Id. at 2325. The Court held that the appropriate standard is "deliberate indifference." Id. at 2327. In reaching

its decision, the Court discussed its previous decision in Rhodes v. Chapman, 101 S.Ct. 2392 (1981). The Court noted that its decision in Rhodes "turned on the objective component of an Eighth Amendment prison claim (was the deprivation sufficiently serious?), and . . . did not consider the subjective component (did the officials act with a sufficiently culpable state of mind?)." Seiter, 111 S.Ct. at 2324. Thus, in Seiter the Court expands the requirements for an Eighth Amendment claim by adding a subjective component.

The Court's establishment in Seiter of a subjective component for an Eighth Amendment claim does not vitiate our determination of what satisfies the objective component. Our holding that it is cruel and unusual punishment to house a prisoner in an environment that exposes him to levels of ETS that pose an

unreasonable risk of harming his health constitutes the objective component of McKinney's Eighth Amendment claim. Seiter simply adds another element to an Eighth Amendment claim that McKinney must prove.

In our opinion we agreed with the magistrate's ruling that directed a verdict on the issue of defendants' deliberate indifference to McKinney's serious existing medical symptoms. As McKinney points out, indifference to current medical problems is distinct from indifference to the problem of involuntary, long term exposure to unreasonable levels of ETS. Accordingly, we remand for further proceedings to determine whether the prison officials showed deliberate indifference to McKinney's long term exposure to ETS. We also repeat our recommendation that the district court appoint an expert witness

or witnesses.

We reinstate the judgment of this court and remand for further proceedings consistent with this court's previous opinion and with Seiter. We understand that a local attorney in Reno, Nevada has agreed to represent McKinney in district court proceedings. If this does not prove to be the case we also repeat our recommendation that the district court appoint an attorney to represent McKinney.

REINSTATED AND REMANDED.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 91-269

Donald L. Helling, et al.,

Petitioners,

v.

William McKinney

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that

this cause is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Wilson v. Seiter, 501 U.S. ___ (1991).

October 15, 1991

AMENDED JUDGMENT

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM MCKINNEY, Plaintiff-Appellant, vs. PAT ANDERSON; CAROL PLOYHAR; H.L. WHITLEY; GEORGE W. SUMNER; JOHN NYE, Defendants-Appellees.	)	No. 89-16589 D.C. No. CV-N-87-36-ECR OPINION

Appeal from the United States District Court for the District of Nevada
Edward C. Reed,
District Judge, Presiding

Submitted November 6, 1990*
San Francisco, California

Filed February 1, 1991

Opinion by Judge Harry Pregerson

Before: BROWNING, PREGERSON, and TROTT, Circuit Judges

HARRY PREGERSON, Circuit Judge:

William McKinney, a prisoner in Nevada state prison in Carson City, filed a pro se civil rights complaint in United States District Court under 42 U.S.C. § 1983. McKinney, a non-smoke, alleged that he is almost constantly exposed to secondary cigarette smoke, also known as environmental tobacco smoke (ETS), because he is housed with a heavy smoker and there are no restrictions on smoking in the prison. McKinney complained that the exposure to ETS caused him nosebleeds, headaches, chest pains, and loss of energy. McKinney stated that the prison officials repeatedly denied his requests to be transferred to a single room or to be housed with a non-smoker.

McKinney asserts two distinct Eighth Amendment claims. First, he alleged that prison officials were deliberately indifferent to his serious existing medical symptoms, which he asserts were

caused by exposure to ETS. Second, he asserts that his exposure to ETS constitutes cruel and unusual punishment. McKinney also asserts that prison officials denied him due process of law by their refusal to apply a Nevada anti-smoking statute to the prison library. McKinney sought damages and injunctive relief to remedy the alleged violations of his constitutional rights.

Individuals named as defendants are George Sumner, the director of the prison; H.L. Whitley, the warden; Pat Anderson, the associate warden; Carol Ployhar, a unit counselor; and John Nye, the store manager at the prison.[1] All are employees of the Nevada Department of Prisons.

All proceedings in this action were conducted before a magistrate. Pursuant to Fed. R. Civ. P. 65, she consolidated McKinney's motion for preliminary

injunctive relief with the trial on the merits. The magistrate also denied McKinney's motion to appoint an expert to testify about the health effects of ETS, and granted the defendants' motion in limine narrowing the issues to be tried.

The court allowed McKinney to proceed on two issues: whether he had a constitutional right to be housed in a smoke-free environment, and whether defendants were indifferent to his serious medical needs. Both before and during trial, McKinney sought to litigate the degree of his exposure to ETS and the actual and potential effects of such exposure on his health. The magistrate, however, excluded evidence that did not relate to McKinney's current medical symptoms, including documentation of the potential health effects of exposure to ETS.

After McKinney presented his

evidence to a jury, the defendants moved for a directed verdict on the ground that McKinney failed to produce any evidence to support his claim that the defendants were deliberately indifferent to his serious medical symptoms. The magistrate granted the motion. The district court found that, as a matter of law, McKinney had no constitutional right to be free of secondary cigarette smoke. The magistrate framed the issue in all-or-nothing terms: either McKinney had a constitutional right to a completely smoke-free environment, or he had only a constitutional right to medical attention for proven serious medical needs. By so doing, the magistrate excluded a valid eighth amendment claim lying between these two extremes: that compelled exposure to levels of ETS that pose an unreasonable risk of harm to human health constitutes cruel and unusual punishment.

McKinney filed a notice of appeal[2] and requested that the government provide him with a transcript of the trial. The magistrate denied this request.

On appeal, McKinney raises the following arguments:

(1) that the magistrate erred in holding that, as a matter of law, compelled exposure to ETS does not violate a prisoner's constitutional rights;

(2) that the magistrate erred in holding that the Nevada anti-smoking statute does not apply to state prison libraries;

(3) that the magistrate erred in refusing to appoint an expert witness to testify about the health effects of exposure to ETS;

(4) that the magistrate erred in entering a directed verdict in favor of the defendants on the claim of deliberate

indifference to serious medical symptoms; and

(5) that the magistrate erred in denying McKinney's request for production of a trial transcript at government expense.

DISCUSSION

A. Does a Prisoner Have a Constitutional Right to Be Free of Exposure to Levels of ETS that Pose an Unreasonable Risk of Harm to His Health?

In her order granting defendants' motion for a directed verdict, the magistrate declared that there is no constitutional right for an inmate to be free from secondary cigarette smoke. The magistrate ruled that a prisoner can show a constitutional violation from involuntary exposure to ETS only by proving that the state was deliberately indifferent to his serious, immediate medical symptoms. We disagree. For the

reasons that follow, we conclude that, even if an inmate cannot show that he suffers from serious, immediate medical symptoms caused by exposure to ETS, compelled exposure to ETS is nonetheless cruel and unusual punishment if it is at such levels and under such circumstances as to pose an unreasonable risk of harm to an inmate's health.

It is unquestioned that the Eighth Amendment's bar on cruel and unusual punishments proscribes more than just barbarous physical punishments. Estelle v. Gamble, 429 U.S. 97, 102 (1976). The Eighth Amendment prohibits penalties that transgress today's "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ." Id. (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir, 1968)). It is also undisputed that the conditions of confinement in a prison are subject to

scrutiny under Eighth Amendment standards. Hutto v. Finney, 437 U.S. 678, 685 (1978). When the state takes a person into its custody, who by reason of the deprivation of his liberty cannot care for himself, the Constitution imposes upon the state a corresponding duty to assume responsibility for the prisoner's safety and well-being. Estelle, 429 U.S. at 103-104; Hoptowit v. Spellman, 753 F.2d 779, 784 (9th Cir. 1985).

The Supreme Court in Rhodes v. Chapman, 452 U.S. 337 (1981), discussed the standard by which courts must examine an Eighth Amendment claim:

> No static "test" can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." The Court has held, however, that "Eighth Amendment judgments should neither be nor appear to be merely the subjective views" of judges. To be sure, "the

> Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability" of a given punishment. But such "'judgment[s] should be informed by objective factors to the maximum possible extent.'"

Id. at 346 (citations omitted). We must therefore determine, judging by objective factors and measured against our society's evolving standards of decency, whether it is cruel and unusual punishment to confine an inmate in a prison where he is exposed to levels of ETS that pose an unreasonable risk of harm to his health.

In this circuit, it is established that exposure to ETS by people who are sensitive to ETS because of pre-existing conditions may constitute cruel and unusual punishment. In Franklin v. State of Oregon, 662 F.2d 1337, 1346-47 (9th Cir. 1981), we held that housing an inmate suffering from throat cancer with a smoker may violate the Eighth

Amendment. We have not examined the question whether an inmate who is not suffering from a pre-existing condition may state a valid cause of action under the Eight Amendment by alleging that continual involuntary exposure to ETS poses an unreasonable risk of harm to his health.

In Avery v. Powell, 695 F. Supp. 632 (D.N.H. 1988), the district court declined to dismiss an Eighth Amendment claim based on exposure to ETS. The court first determined that, because widely accepted scientific evidence shows that ETS poses health hazards, unwanted exposure to ETS may be a punishment within the meaning of the Eighth Amendment. Id. at 639. The court then ruled that our society's attitudes have evolved to the point that unwanted exposure to ETS may amount to a violation of "society's evolving standards of

decency." Id. at 639-40. The court noted that, as of 1987, forty-five states and the District of Columbia had enacted laws restricting smoking. Id. at 640. In addition, the court noted that the federal government has enacted laws and regulations aimed at reducing involuntary exposure to ETS on common carriers and in buildings that the government controls and operates, including federal prisons. Id.

In Clemmons v. Bohannon, 918 F.2d 858, reh'g en banc granted, ____ F.2d ____, 1990 U.S. App. LEXIS 20375 (10th Cir. 1990), the Tenth Circuit agreed with Avery in holding that indefinite double-celling of smokers with nonsmokers against their expressed will can amount to a violation of the Eighth Amendment. The court in Clemmons stated that its ruling reflected "a longstanding judicial recognition that exposing a prisoner to

an unreasonable risk of a debilitating or terminal disease does indeed offend [the] 'evolving standards of decency.'" 918 F.2d at 864.[3]

We agreed with the reasoning in Avery and Clemmons. The following discussion explains that: (1) scientific evidence has rapidly accumulated in the last few years regarding the adverse health effects resulting from exposure to ETS; (2) the health consequences from exposure to ETS are magnified in prison settings because of the nearly constant exposure of inmates to elevated levels of ETS; (3) we have long recognized that conditions of confinement that threaten inmates' health and safety are unconstitutional; and (4) the attitude of our society has evolved to the point where, today, it indeed violates society's standards of decency to expose an unwilling inmate to levels of ETS that

pose an unreasonable risk of harm to human health.

1. Scientific Evidence on ETS

In determining whether conditions of confinement are constitutional, "the court's judgment must be informed by current and enlightened scientific opinion as to the conditions necessary to insure good physical and mental health for prisoners." Spain v. Procunier, 600 F.2d 189, 200 (9th Cir. 1979).

It is beyond dispute that direct ingestion of tobacco smoke is harmful to health. The Surgeon General estimates that smoking is responsible for more than one of every six deaths in the United States.[4] More than 3800 compounds have been identified in cigarette smoke[5] and, of those, forty-three are carcinogenic.[6]

Mainstream cigarette smoke is the smoke that smokers draw directly into their mouths and lungs. Environmental

tobacco smoke (ETS) consists of the fraction of mainstream smoke that smokers exhale plus sidestream smoke, which burning cigarettes emit between puffs.[7] The chemical composition and the qualitative toxic and carcinogenic effects of ETS and mainstream smoke are similar, although the relative concentration of individual components may differ.[8]

Only recently have national public health agencies been able to draw firm conclusions regarding the health effects of exposure to ETS. In 1979, the Surgeon General reported that tobacco smoke can be a significant source of air pollution indoors.[9] Under conditions of heavy smoking and poor ventilation, the concentration of carbon monoxide level in the air may exceed the maximum limit for exposure during and eight-hour workday (fifty parts per million (ppm)).[10] Even

with adequate ventilation, the concentration of atmospheric carbon monoxide may exceed nine ppm, the allowable ambient air quality limit set by the Environmental Protection Agency (EPA).[11]

In 1982 the Surgeon General reported that "[a]lthough the currently available evidence is not sufficient to conclude that passive or involuntary smoking causes lung cancer in nonsmokers, the evidence does raise concern about a possible serious public health problem."[12] The Surgeon General reported in 1984 that studies have found differences in measures of pulmonary function between subjects chronically exposed to ETS and those who were not.[13]

By 1986 the scientific evidence became strong enough for the Surgeon General to state conclusively that ETS causes non-smokers to develop lung

cancer:

> In examining a low-dose exposure to a known carcinogen, it is rare to have such an abundance of evidence on which to make a judgment, and given this abundance of evidence, a clear judgment can now be made: exposure to ETS is a cause of lung cancer. The data presented in this Report establish that a substantial number of the lung cancer deaths that occur among nonsmokers can be attributed to involuntary smoking.[14]

The 1986 Report also found that acute and chronic respiratory diseases have been linked to ETS.[15] In sum, the Surgeon General concluded, "[i]nvoluntary smoking is a cause of disease, including cancer, in healthy nonsmokers."[16]

Concerning the critics of studies demonstrating the adverse health effects of ETS, the Surgeon General in the 1986 Report warned:

> Critics often express that more research is required, that certain studies are flawed, or that we should delay action until more conclusive proof is produced. As both a physician and a public health official, it is my judgment that the time for delay is past; measures to protect the public health are

> required now. The scientific case against involuntary smoking as a health risk is more than sufficient to justify appropriate remedial action, and the goal of any remedial action must be to protect the nonsmoker from environmental tobacco smoke.[17]

If the time for delay had passed by 1986, additional scientific evidence uncovered since then makes the Surgeon General's warning even more urgent in 1991.

A draft report released by the EPA concluded:[18]

> (1) ETS is causally associated with lung cancer in nonsmoking adults and that, according to EPA guidelines for carcinogen risk assessment, ETS is a Group A (known human) carcinogen; and
>
> (2) approximately 3800 lung cancer deaths per year among nonsmokers (never-smoker and former smokers) of both sexes in the United States are attributable to ETS.

55 Fed. Reg. 25,874 (1990).

The EPA classifies suspected human carcinogen into three groups. Group A consists of known human carcinogens; Group B, probable human carcinogens;

Group C, possible human carcinogens; Group D, agents that are unclassifiable as to human carcinogenicity; and Group E, agents that have shown evidence of non-carcinogenicity for humans.[19] Examples of Group A carcinogens are arsenic, asbestos, benzene, chromium compounds, and vinyl chloride.[20] If there were any doubt about the causative and quantitative link between lung cancer and ETS exposure, the EPA draft report firmly concludes that ETS is a definite and significant cause of lung cancer in humans.

2. Exposure to ETS in Prisons.

The parties agree that two-thirds of the inmates at Carson City smoke.[21] The state does not dispute that McKinney is confined to a six-foot by eight-foot room with poor ventilation and that his roommate smokes five packs of cigarettes a day. The state also admits that, other

than in the infirmary and the culinary, there is no restriction on smoking in the prison.

Unlike the general population, prisoners are not free to avoid or leave places where smoking is allowed. Prisoners cannot simply leave their cells when their cellmates decide to light up. In addition, because smoking is permitted virtually everywhere in the prison, and because it is undisputed that a clear majority of the prisoners are smokers, McKinney is almost constantly exposed to ETS at elevated levels. A reasonable factfinder could conclude that the adverse health effects associated with ETS exposure would be especially severe for McKinney.

3. Unconstitutional Condition of Confinement.

The court in Gorman reasoned that despite the scientific evidence that

exposure to ETS is harmful to health, our society's standards of decency do not yet demand a smoke-free environment in a prison setting. Gorman, 710 F. Supp. at 1262. In our circuit, however, a finding that ETS endangers human health is sufficient to show an Eighth Amendment violation, even without a separate inquiry into society's evolving standards of decency. Our prior decision in Hoptowit clearly established that the Eighth Amendment's ban of cruel and unusual punishments prohibits conditions of confinement that pose unreasonable threats to inmates' health.

In Hoptowit, we held that "[p]ersons involuntarily confined by the state have a constitutional right to safe conditions of confinement." 753 F.2d at 784 (citing Youngberg v. Romeo, 457 U.S. 307 (1982)). While not every deviation from ideally safe conditions may amount to a

constitutional violation, we ruled that conditions of confinement that seriously threaten the health and safety of the inmates are unconstitutional. Id. at 783-84.

Our prior cases demonstrate that the difference between constitutional and unconstitutional conditions of confinement can turn on the air that the prisoners breathe. In Hoptowit, we held that housing inmates in units with inadequate ventilation and air flow is unconstitutional. Id. at 784. In Spain, we held that denying prisoners fresh air and opportunities for regular outdoor exercise violates the Eighth Amendment. 600 F.2d at 199.

If making inmates breathe stagnant air is cruel and unusual punishment, it must be even more so to force inmates to breathe air containing levels of known human carcinogens sufficient to pose an

unreasonable risk of harm to human health. It is hard to imagine that our society would tolerate exposing inmates to dangerous levels of any other Group A carcinogens, like benzene, asbestos or arsenic.

Poor air quality is not the only condition of confinement that may unconstitutionally threaten the health and hygiene of prisoners. We have held that poor lighting, broken-down plumbing, unsanitary food handling, and polluted water can also violate prisoners' Eighth Amendment rights. See Hoptowit, 753 F.2d at 783; Jackson v. Arizona, 885 F.2d 639, 641 (9th Cir. 1989). We have not waited until these conditions actually caused illness, but have mandated relief based on the risk these conditions entail. See id.

We draw additional support for our view from decisions in other circuits.

See Martin v. Sargent, 780 F.2d 1334, 1338 (8th Cir. 1985) (allegations of inadequate diet, unhealthy physical condition of the prison, denial of personal hygiene items, and the lack of sufficient opportunity to exercise each state a valid Eighth Amendment claim); Ramos v. Lamm, 639 F.2d 559, 567-72 (10th Cir. 1980) (inadequate ventilation, obstructed plumbing system, and unsanitary living quarters are constitutionally impermissible); Cunningham v. Jones, 567 F.2d 653, 660 (6th Cir. 1977) (improper diet for prisoners violates the Eighth Amendment); Gates v. Collier, 501 F.2d 1291, 1302 (5th Cir. 1974) (holding that conditions of confinement that clearly threaten the health of the prisoners and substantially deprive them of basic elements of hygiene are unconstitutional).

Under Hoptowit and Spain, it is

established that conditions in a prison that threaten a prisoner's health constitute cruel and unusual punishment. Scientific evidence is clear that exposure to ETS can have serious adverse health consequences. If housing nonsmokers and smokers in the same prison cell or allowing unrestricted smoking in other parts of the prison exposes nonsmoking inmates to a level of ETS that poses an unreasonable risk to their health, the Eighth Amendment is violated.

4. Evolving Standard of Decency.

Thus, McKinney's claim may well fit within the boundaries of conditions of confinement that we have held unconstitutional because they pose unreasonable risks of harm to prisoners' health. In addition, we conclude that the attitude of our society has evolved at least to the point that it violates current standards of decency to expose

unwilling prisoners to ETS levels that pose an unreasonable risk of harm to their health.

To determine the prevailing attitude of the society, we review the statutes and regulations that society has enacted.[22] As noted earlier in the discussion of Avery, as of 1987 forty-five states and the District of Columbia had enacted statutes restricting smoking in public places. Avery, 695 F. Supp. at 640. A significant percentage of the statutes were passed by lawmakers motivated by health concerns about exposure to ETS. Id. In fact, Nevada's anti-smoking statute,[23] which bans or restricts smoking in "public places," declares that the purpose of the statute is to restrict smoking to protect human health and safety. "The quality of air is declared to be affected with the public interest and [this statute is]

enacted in the exercise of the police power of this state to protect the health, peace, safety and general welfare of its people." Nev. Rev. Stat. § 202.249 (1987). Other states' anti-smoking statutes contain similar language.[24]

At the federal level, smoking is banned on all domestic airline flights, except flights to and from Alaska and Hawaii. 49 U.S.C.A. App. § 1374(d) (West Supp. 1990). Smoking is also restricted or prohibited in many places by regulations promulgated by federal agencies pursuant to their rule-making authority. See 14 C.F.R. §§ 252.1 - .7 (1990) (regulation for restricting smoking on flights on which smoking is not otherwise banned); 41 C.F.R. § 101-20.105-3 (1990) (regulations for controlling smoking in facilities owned by the General Services Administration);

and 49 C.F.R. § 1061.1 (1988) (regulation for limiting smoking on interstate passenger carriers).

Most significantly, prisons and jails are beginning to take steps to restrict or ban smoking. A federal Bureau of Prison regulation prohibits smoking in those areas of federal penitentiaries where "smoking would pose a hazard to health or safety" and allows the warden to designate smoking and no-smoking areas in other areas. 28 C.F.R. § 551.162 (1989). The American Jailers Association, which represents 6,500 jail administrators, passed a resolution endorsing bans on smoking by inmates.[25] As of May, 1990, county and state corrections departments in thirteen states have either banned or are considering banning smoking.[26]

At the local level, more than eighty cities and counties have enacted smoking

laws since 1980.[27] The most comprehensive anti-smoking ordinance was passed in San Luis Obispo, California. The ordinance prohibits smoking in any indoor public area in San Luis Obispo, including all shops, restaurants, and bars.[28]

This review of legislation and regulations shows that society sees a need to protect non-smokers from involuntary exposure to ETS, which is increasingly regarded as a hazard to the health of non-smokers. Prohibition or restriction of smoking in jails and prisons across the country indicates that at least some states and the federal government have already recognized that inmates deserve protection for ETS.

5. Conclusion.

We hold that McKinney has stated a valid Eighth Amendment claim for injunctive relief by alleging that his exposure to ETS in the prison is harmful

to his health. This claim for injunctive relief is remanded to the district court for further proceedings consistent with this opinion.[29] McKinney should be allowed to present evidence regarding the level and degree of his exposure to ETS and whether that degree of exposure is sufficient to create an unreasonable risk of harm to his health. Because of the complexity of McKinney's case and the difficulty of gathering and presenting medical and technical evidence on the long-term effects of exposure to ETS, the district court should consider, or remand, appointing an attorney to represent McKinney.

6. Damages.

Our holding that McKinney has stated a cause of action for injunctive relief does not automatically entitle him also to pursue his claim for damages. The defendants have raised the affirmative

defense of qualified immunity, which shields them from liability for damages if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Officials pleading qualified immunity are liable for damages only if the contours of the right they are alleged to have violated are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). At the time the defendants acted, there was no clearly established liability for exposing prisoners to ETS. The defendants are therefore entitled as a matter of law to prevail on their defense of qualified immunity, and McKinney's

claim for damages must fail.

B. Does the Nevada Anti-Smoking Statute Apply to Prison Libraries?

McKinney argues that the Nevada anti-smoking statute[30] applies to prison libraries and that the defendants have violated his due process rights by failing to apply the statute to restrict smoking in the library. Prisoners claiming a due process violation under the Fourteenth Amendment must demonstrate that they have been deprived of a protected liberty or property interest by arbitrary government action. Meachum v. Fano, 427 U.S. 215, 226-27 (1976). These interests may arise from the Constitution or statutes. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 7-11 (1979).

In Gorman, the plaintiff argued that the Indiana anti-smoking law, which makes it illegal to smoke in public buildings

except in designated smoking areas, applies to prison facilities. 710 F. Supp. at 1263. The court in Gorman held that the Indiana statute does not create a protected liberty interest for prisoners because the statute's definition of "public building" does not include prisons. Id. The Indiana statute defines "public building" as an enclosure or a part of an enclosure that "is occupied by any agency of state or local government" or is used as a public school or as a licensed health facility. Id.

The court in Avery, in contrast, found that the definition of "enclosed public places" in the anti-smoking legislation of New Hampshire does include prisons. 695 F. Supp. at 640. The New Hampshire law defines "enclosed public places" as "'any enclosed, indoor area which is publicly owned or supported by

tax revenues.'" Id. (quoting N.H. Rev. Stat. Ann. 155:45-53 (Equity Supp. 1987)).

The Nevada statute does not define public places or building. Instead, it prohibits or limits smoking in certain specific public places, including any "[p]ublic elevator, library, museum, or a bus used by the general public, other than a chartered bus." Nev. Rev. Stat. § 202.2491.1(a) (1987). The Attorney General of Nevada interprets the provision to mean that the smoking law applies to all libraries, whether they be publicly or privately operated. 191 Nev. Op. Att'y Gen. 46, 47 (1975). If the Attorney General is correct, the statute should apply to prison law libraries as well.

In the absence of any decisional law interpreting the Nevada law, we believe that Nevada courts would find the

attorney general's opinion persuasive. In addition, we fail to see why the public policy of the state of Nevada to protect the health of its people from ETS[31] should not apply within prison walls. Therefore, we hold that the Nevada anti-smoking statute applies to state prison law libraries. We further hold that the statute creates a liberty interest in smoke-free prison libraries that is protected by the due process clause. We reverse the magistrate's ruling and remand for further proceedings on this claim for injunctive relief.[32]

C. Should the Magistrate Have Appointed an Expert Witness?

Important to McKinney's case would be the testimony of an environmental toxicologist regarding the health effects of exposure to ETS. Because he was unable to find an expert who would testify without a fee, McKinney requested

that the district court appoint an expert witness at government expense under Fed. R. Evid. 706. The magistrate denied his requests.

Under Rule 706, the court may on its own motion or on the motion of another party appoint an expert witness. Fed. R. Evid. 706(a). The expert so appointed is entitled to reasonable compensation as the court may allow, and in a civil case the compensation is "paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs," unless funds have been provided by law to pay the compensation. Fed. R. Evid. 706(b).

The magistrate found that because no fund have been provided by law to pay the compensation of an expert witness in civil rights cases, any expert appointed by the court must be paid by the parties. The magistrate then ruled that no expert

may be appointed in the present case because McKinney, who proceeded in forma pauperis, would be unable to pay his proportion of the fees. The magistrate interpreted Rule 706(b) as allowing court-appointed experts only when both sides are able to pay their respective shares.

We believe that the magistrate's ruling was based upon an unduly restrictive reading of the rule. As we noted in Students of Cal. School for the Blind v. Honig, 736 F.2d 538, 549 (9th Cir. 1984), "Rule 706 . . . allows the court to assess the cost of the expert's compensation as it deems appropriate." We believe that the phrase "such proportion as the court directs," in an appropriate case, permits the district court to apportion all the cost to one side. Otherwise, we are faced with an inflexible rule that would prevent the

district court from appointing an expert witness whenever one of the parties in an action is indigent, even when the expert would significantly help the court.

We hold that the district court does have the discretion to appoint an expert witness in this case and that McKinney is entitled to the benefit of the court's exercise of its discretion. Considering the complexity of the scientific evidence in the present case, we recommend that, on remand, the district court consider appointing an expert witness or witnesses who can provide the court with scientific information on the health effects of ETS and on the concentration levels of ETS in the Carson City prison.

D. Did the District Court Err in Entering a Directed Verdict in Favor of the Defendants on McKinney's Deliberate Indifference Claim?

Our role in reviewing a directed

verdict is the same as the district court's. The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1151 (9th Cir. 1988). A directed verdict is proper if, without considering the "credibility of the witnesses, we find that the evidence and its inferences, considered as a whole and viewed in the light most favorable to the nonmoving party, can support only one reasonable conclusion--that the moving party is entitled to judgment . . . " Id. (citation and internal quotation omitted).

The magistrate allowed McKinney to go to trial before a jury on the issue of whether the defendants were deliberately indifferent to existing serious medical symptoms.[33] There is no evidence in the record to suggest that prison officials were deliberately indifferent to McKinney's existing medical symptoms. McKinney was examined by the prison

doctor, who found no serious existing ailments requiring treatment. We therefore affirm the magistrate's ruling directing a verdict on the issue of defendants' deliberate indifference to McKinney's asserted medical symptoms.

E. Did the District Court Err in Denying McKinney's Motion for Production of Trial Transcripts at Government Expense?

In appealing the decision of the district court, McKinney asked for the production of the trial record at government expense. Production of the transcript at government expense for appellant in forma pauperis in a civil case is proper under 28 U.S.C. § 753 if a trial judge certifies that the appeal is not frivolous and presents a substantial question. 28 U.S.C.A. § 753(f) (West Supp. 1990).

Of the issues raised by McKinney,

the only one that requires the trial transcript is his claim that the district court erred in granting the directed verdict. The magistrate denied McKinney's motion, holding that she was unable to certify that the appeal is not frivolous because she was unable to determine on what grounds McKinney was seeking to overturn the directed verdict. McKinney merely stated conclusorily in his motion that the trial court erred in granting defendants' motion for a directed verdict but failed to point to specific errors made by the magistrate in entering the directed verdict.

The relief under section 753 is permissive. Because the record does not indicate that the magistrate abused her discretion in denying McKinney's motion, we affirm the magistrate's ruling.

CONCLUSION

We conclude that the Eighth

Amendment forbids prison officials from housing McKinney in a prison environment that exposes him to levels of ETS that pose an unreasonable risk of harming his health. He has therefore stated a valid cause of action and may be entitled to injunctive relief. We reverse and remand this claim for further equitable proceedings, including a trial, if necessary, with the possible assistance of an attorney and an expert witness.[34] We also hold that Nevada's anti-smoking statute applies to prison libraries and remand McKinney's due process claim for further equitable proceedings. Although these claims for injunctive relief may proceed, McKinney's claims for money damages must fail because, in the circumstances of this case, state prison officials are entitled to qualified immunity as a matter of law. We affirm the magistrate's grant of a directed

verdict on the issue of defendants' indifference to McKinney's immediate medical symptoms and also affirm her denial of McKinney's motion for a free trial transcript.

AFFIRMED IN PART, REVERSED IN PART and REMANDED

COUNSEL

William McKinney, In Pro Per, Carson City, Nevada.

Kevin G. Higgins, Deputy Attorney General, Carson City, Nevada, for defendants-appellees.

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* The panel unanimously found this case suitable for decision without oral argument. Fed. R. Ap. P. 34(a) and Ninth Circuit Rule 34-4.

[1] McKinney also named two cigarette manufactures and a distributor of cigarettes sold in the prison. The companies were never served with the complaint and have not made an appearance in the action.

[2] The parties consented to have a United States Magistrate conduct the trial and order the entry of a final judgment.

Under 28 U.S.C. § 636(c)(3), parties may appeal "directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court." 28 U.S.C.A. § 636(c)(3) (West Supp. 1990).

[3] Gorman v. Moody, 710 F. Supp. 1256 (N.D. Ind. 1989) is not to the contrary. In Gorman, the district court held that, even if it could be shown that ETS is harmful to non-smokers' health, the "'standards of decency that mark the progress of society'" have not evolved to the stage where the Eighth Amendment mandates a smoke-free environment in a prison setting. Id. at 1262. But as noted above, the right to an utterly smoke-free environment is not the real questions. While the Constitution may not mandate a smoke-free environment, it does mandate an environment that does not expose inmates to a significant risk of harm to their health. Similarly, in Caldwell v. Quinlan, 729 F. Supp. 4, (D.D.C. 1990), aff'd, 1990 U.S. App. LEXIS 18664 (D.C. Cir. 1990), the court held that a totally smoke-free environment was not required where prison authorities had already provided separate housing units and other facilities for non-smokers. Id. at 5-6. That conclusion is not inconsistent with our decision here.

[4] U.S. Dep't of Health and Human Services, Reducing the Health Consequences of Smoking: 25 Years of Progress, A Report of the Surgeon General 11 (1989) (hereinafter "1989 Report").

[5] National Research Counsel, Environmental Tobacco Smoke: Measuring

Exposures and Assessing Health Effects 2 (1986) (hereinafter "NRS Report"). The report was prepared by the National Research Counsel in response to a request from two federal government agencies, the Office of Air and Radiation of the Environmental Protection Agency and the Office of Smoking and Health of the Department of Health and Human Services.

[6] 1989 Report, at 12.

[7] U.S. Dep't of Health and Human Services. The Health Consequences of Involuntary Smoking, A Report of the Surgeon General 7 (1986) (hereinafter "1986 Report").

[8] Id. at 7-8.

[9] U.S. Dep't of Health, Education, and Welfare, Smoking and Health, A Report of the Surgeon General ch. 11, at 32 (1979).

[10] Id.

[11] Id. at 21.

[12] U.S. Dep't of Health and Human Services, The Health Consequences of Smoking: Cancer, A Report of the Surgeon General at 9 (1982).

[13] U.S. Dep't of Health and Human Services, The Health Consequence of Smoking: Chronic obstructive Lung Disease, A Report of the Surgeon General 405 (1984).

[14] 1986 Report, at 10. The NRC Report, supra n. 5, also released in 1986, came to the same conclusion as the Surgeon General's report. It concluded that "[c]onsidering the evidence as a whole,

exposure to ETS increases the incidence of lung cancer in nonsmokers." Id. at 10.

[15] 1986 Report, at 10.

[16] Id. at 7.

[17] 1986 Report, at xi-xii.

[18] Environmental Protection Agency, Health Effects of Passive Smoking; Assessment of Lung Cancer in Adults and Respiratory Disorders in Children; External Review Draft, 55 Fed. Reg. 25,874 (1990). The announcement in the Federal Register states that the draft report was prepared pursuant to the Superfund Act. A final report is expected in the summer of 1991.

[19] Environmental Protection Agency, Methodology for Evaluating Potential Carcinogenicity in Support of Reportable Quantity Adjustments Pursuant to CERCLA Section 102 13-16-(1988).

[20] Id. app. at 37-42

[21] Nationwide, the proportion of smokers in prisons is 90 percent. N.Y. Times, July 9, 1990 at A10, col. 5.

[22] This approach is consistent with that taken in Thompson v. Oklahoma, 487 U.S. 815 (1988), in which both the plurality and the dissent relied on state statutes to determine the attitude of society regarding the appropriateness of death penalty for those who committed crimes while minors. See also Gorman, 710 F. Supp. at 1261; Avery 695 F. Supp. at 639 (citing Thompson).

[23] Nev. Rev. Stat. §§ 202.249 - .2492 (1987).

[24] See Clemmons, 1990 U.S. App. LEXIS 17683, at *24-*25; Avery, 695 F. Supp. at 640.

[25] N.Y. Times, July 9, 1990 at A10, col. 5.

[26] Id.

[27] 1986 Report, at 324.

[28] L.A. Times, August 2, 1990, at A3, col. 2.

[29] This court does not have enough facts about the conditions of the prison to decide what kind of separation of smokers and non-smokers would meet the constitutional standard.

[30] Nev. Rev. Stat. §§ 202.249 - .2492 (1987).

[31] Nev. Rev. Stat. § 202.249.

[32] Because no court has previously held that the Nevada statute applies to prison libraries, the defendants have not violated clearly established law. Their valid claim to qualified immunity therefore precludes McKinney from proceeding with his claim for damages.

[33] This issue, although also based on the Eighth Amendment, is different from the question whether prisoners are constitutionally entitled to be free from compelled exposure to levels of ETS that pose an as-yet-unrealized risk of harming their health.

[34] Our decision to remand obviates the need to rule on whether the magistrate correctly granted the defendants' motion in limine.

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM McKINNEY,	)	Case Number:
	)	CV-N-87-36-PHA
Plaintiff,	)	
	)	ORDER ENTERING
vs.	)	JUDGMENT IN
	)	FAVOR OF
PAT ANDERSON, et al.,	)	DEFENDANTS
	)	
Defendants.	)	

Inmate William McKinney filed a lawsuit against various officials of the Nevada Department of Prisons alleging that he had a constitutional right to be free from exposure to secondary cigarette smoke. He claimed that his health had been damaged by such exposure and that prison officials had refused to move him to a cell where he would not be subjected to that smoke. McKinney also stated

claims against various tobacco companies, but failed to appropriately serve them and they are not parties at this time in this case.

After pretrial motions were heard, the parties in the joint pretrial order narrowed the issues to:

> (1) Whether McKinney had requested to be housed with a non-smoker;
>
> (2) What Defendants had done to accommodate those wishes;
>
> (3) To what degree McKinney had been exposed to cigarette smoke;
>
> (4) Whether McKinney's health had been injured by that exposure;
>
> (5) Whether McKinney had any medical conditions that made him susceptible to injury from such exposure;
>
> (6) How each Defendant was personally involved in the alleged constitutional deprivations; and
>
> (7) How a smoking ban would affect the Nevada State Prison.

The essential issues of law were whether McKinney had a constitutional right to be housed in a smoke-free

environment and whether Defendants were deliberately indifferent to McKinney's serious medical needs.

A review of the pertinent case law reveals that there is no constitutional right to be housed with a non-smoker. This issue is one of first impression for this district court and has only recently been considered in other district courts across the country. The most recent published decision about this issue is Gorman v. Moody, 710 F. Supp. 1256 (D. Ind. 1989). The judge in Gorman has announced what appears to be the consensus of the federal courts as to this issue. While the court recognized that society may be moving toward an opinion as to the propriety of non-smoking and a smoke-free environment, society cannot yet completely agree on the propriety of non-smoking areas and a smoke-free environment.

> Whether to provide smoke-free areas must be left to the discretion of legislatures and prison officials who must operate the prison to the best of their abilities, and those officials must make those decisions after consideration of all factors relevant to the particular institution and the care and welfare of all inmates.

Gorman at 710.

In Beeson v. Johnson, 668 F. Supp. 498 (E.D.N.C. 1987), the court held that the present state of the law seems to be that "persons who are not incarcerated have no constitutional right to a smoke-free environment." Beeson at 501. Nor would apparently inmates have such a right.

In Lee v. Carlson, 645 F. Supp. 1430 (N.D.N.Y. 1986), the court held that a similar complaint by an inmate failed to state a cause of action against other defendants ". . . because there is no allegation in the complaint, and nothing in the record, to indicate that plaintiff

was being exposed to smoke in violation of any then-existing statute or regulation, or that any of the other defendants acted unreasonably under the circumstances in exposing plaintiff to tobacco smoke." Lee at 1438.

No court has gone so far as to state that there is a constitutional right for an inmate to be free from exposure to cigarette smoke. The other courts' reasoning is hereby adopted and it is held that there is no constitutional right for an inmate to be free from secondary cigarette smoke.

At best, as the courts above noted, inmates alleging this reported constitutional deprivation may have a claim for deliberate indifference to serious medical needs. In Beeson, the court did not recognize a constitutional right to be housed in a smoke-free environment but allowed the case to

proceed on a theory of alleged deliberate indifference to serious medical needs.

The court adopts that reasoning and finds that Plaintiff has no constitutional right to be free from cigarette smoke, but may have been able to state a claim for deliberate indifference to serious medical needs if he could prove the underlying facts. The Gorman court held that the proper standard in evaluating these types of cases is whether prison officials have been deliberately indifferent to a threat against the inmate and in order to prove so, plaintiff must show that the prison officials intentionally exposed him to a known risk or harm and actually intended to harm him. Gorman at 1260, citing Simpson v. Broglin, 612 F. Supp. 1162 (N.D. Ind. 1985). Thus, in order to survive Defendants' motion for a directed verdict, Plaintiff must be able to set

forth facts sufficient to establish the Defendants had been deliberately indifferent to his serious medical needs.

Based upon the testimony adduced by McKinney during his presentation of his case, he has failed to show either a serious medical need or deliberate indifference to it. His complaint seems to be that he is subject to nosebleeds, sore throats, watery eyes and similar cold symptoms when exposed to secondary cigarette smoke. But McKinney specifically admitted on cross-examination he has also complained of those symptoms resulting from exposure to butane gas, living on a lower bunk, the quality of water at the prison, as well as the quality of his diet. He further specifically admitted that he had no idea what actually caused these symptoms and just assumed that it was the cigarette smoke.

McKinney further admitted upon cross-examination, and evidence from his witnesses included testimony, that he had been examined for these symptoms by the Nevada State prison medical department, but that Dr. Harrison had found nothing wrong with him for which he could be treated. This is not a case in which an inmate has a serious medical need that has been deliberately ignored. This is a case where an inmate with cold-like symptoms was seen by a professional medical staff, treated and told that his symptoms could not definitely be traced to exposure to cigarette smoke.

Such testimony completely fails to establish deliberate indifference to serious medical needs. Nor does such testimony prove that the acts of the Defendants were the proximate cause of any injuries the Plaintiff might have sustained.

> To prove causation or proximate cause, plaintiff must introduce expert medical evidence which affords a reasonable basis for the court to conclude that it is more likely than not that [Defendants'] conduct was a substantial factor bringing about plaintiff's damages. Proof of a medical causal connection must be something more than consistent with the plaintiff's theory of how the claimed damages were caused. Proof of causation cannot rest on conjecture and the mere possibility of such causation is not enough to sustain the plaintiff's burden of proof. Moreover, when the medical causal relation issue is not one within the common knowledge of laymen, proximate cause cannot be determined without expert medical testimony.

Ellis v. United States, 484 F. Supp. 4, 11 (D.S.C. 1978).

McKinney completely failed to adduce any expert testimony or provide any medical evidence which would prove the Defendants' acts were the proximate cause of his injuries. Nor was there any medical proof or testimony that such exposure to cigarette smoke could even

cause such symptoms.

There was no evidence presented of personal involvement by any of the Defendants, nor in accordance with the test announced in Beeson above, was there any indication that any of the Defendants intentionally chose to inflict harm upon the Plaintiff.

McKinney has failed to sustain his burden of proof as a matter of law, and this court has no choice but to grant Defendants' motion for a directed verdict in accordance with Rule 50(a) of the Federal Rules of Civil Procedure.

Judgment is therefore entered in favor of Defendants and against Plaintiff.

DATED this 18th day of OCTOBER, 1989.

SIGNED BY UNITED STATES MAGISTRATE

APPENDIX E

WILLIAM McKINNEY, INMATE #13355
Nevada State Prison
Post Office Box 607
Carson City, Nevada 89701

In Pro Se

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

WILLIAM McKINNEY, Plaintiff, -vs- PAT ANDERSON, ET AL., Defendants.	Case No. CV-N-87-36-ECR NOTICE OF APPEAL

Notice is hereby given that William McKinney, plaintiff in the above-entitled matter appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 27th, 1989, by the United States Magistrate, P. H. Atkins.

Dated this 21 day of November, 1989.

Respectfully submitted

By _____
William McKinney

APPENDIX F

Assembly Bill No. 597--Assemblymen Haller, Anderson, Gibbons, Petrak, Norton, Wong, Bergevin, Johnson, Stout, Bennett, Elliott, Sader, Humke, McGaughey, McGinness, Hardy, Pettyjohn, Arberry and Price

CHAPTER.....

AN ACT relating to public health; clarifying the inapplicability to prison facilities of certain restriction on smoking; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 202.2491 is hereby amended to read as follows:

202.2491 1. Except as otherwise provided in subsections 5 and 6, the smoking of tobacco in any form is prohibited if done in any:

(a) Public elevator.

(b) Public building.

(c) Public waiting room, lobby or hallway of any:

(1) Medical facility or facility for the dependent as defined in chapter 449 of NRS; or

(2) Office of any chiropractor, dentist, physical therapist, physician, podiatrist, psychologist, optician, optometrist, doctor of Oriental medicine or doctor of acupuncture.

(d) Hotel or motel when so designated by the operator thereof.

(e) Public area of a store principally devoted to the sale of food for human consumption off the premises, except in those areas leased to or operated by a person licensed pursuant to NRS 463.160.

(f) Child care facility.

(g) Bus used by the general public, other than a chartered bus, or in any maintenance facility or office associated with a bus system operated by any

regional transportation commission.

(h) School bus.

2. The person in control of an area listed in paragraph (c), (d), (e), (f) or (g) of subsection 1:

(a) Shall post in the are signs prohibiting smoking in any place not designated for that purpose as provided in paragraph (b).

(b) May designate separate rooms or portions of the area which may be used for smoking.

3. The person in control of a public building:

(a) Shall post in the area signs prohibiting smoking in any place not designated for that purpose as provided in paragraph (b).

(b) Shall, except as otherwise provided in this subsection, designate a separate area which may be used for smoking.

A school district which prohibits the use of tobacco by pupils need not designate an area which may be used by the pupils to smoke.

4. The operator of a restaurant with a seating capacity of 50 or more shall maintain a flexible nonsmoking area within the restaurant and offer each patron the opportunity to be seated in a smoking or nonsmoking area.

4. A business which derives more than 50 percent of its gross receipts from the sale of alcoholic beverages or 50 percent of its gross receipts from the sale of alcoholic beverages or 50 percent of its gross receipts from gaming operations may be designated as a smoking area in its entirety by the operator of the business.

6. The smoking of tobacco is not prohibited in:

(a) Any room or area designated for

smoking pursuant to paragraph (b) of subsection 2 or paragraph (b) of subsection 3.

(b) A licensed gaming establishment. A licensed gaming establishment may designate separate rooms or areas within the establishment which may or may not be used for smoking.

7. The person in control of a child care facility shall not allow children in any room or area he designates for smoking pursuant to paragraph (b) of subsection 2. Any such room or area must be sufficiently separate or ventilated so that there are no irritating or toxic effects of smoke in the other areas of the facility.

8. As used in this section:

(a) "Child care facility" means an establishment licensed pursuant to chapter 432A of NRS to provide care for 13 or more children.

(b) "Licenses gaming establishment" has the meaning ascribed to it in NRS 463.0169.

(c) "Public building" means any building or office space owned or occupied by:

(1) Any component of the University of Nevada System and used for any university purpose.

(2) The State of Nevada [or any] <u>and used for any public purpose, other than that used by the department of prisons to house or provide other services to offenders.</u>

(3) <u>Any</u> county, city, school district or other political subdivision of the state and used for any public purpose.

If only part of a building is owned or occupied by an entity described in this paragraph, the term means only that portion of the building which is so owned

or occupied.

(d) "School bus" has the meaning ascribed to it in NRS 483.160.

Sec. 2. This act becomes effective at 12:03 a.m. on October 1, 1991.

(2)

91-1958

No. 91-

Supreme Court, U.S.
FILED
JUN 2 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DONALD L. HELLING, et al.,

Petitioners,

v.

WILLIAM McKINNEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Cornish F. Hitchcock
(Counsel of record)
Alan B. Morrison

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Attorneys for Respondent

June 1992

QUESTION PRESENTED

Did the court of appeals correctly hold that a non-smoking prisoner who is involuntarily exposed to unhealthy amounts of cigarette smoke has a claim for injunctive relief under the Eighth Amendment, if he can prove that the conditions of his confinement, viewed objectively, pose a serious hazard to his health and that prison officials showed deliberate indifference to his situation?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-

DONALD L. HELLING, et al.,

Petitioners,

v.

WILLIAM McKINNEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent William McKinney respectfully asks the Court to deny the petition for a writ of certiorari for the reasons stated below.

STATEMENT OF THE CASE

McKinney, a Nevada state prisoner, filed this action *pro se* in the United States District Court for the District of Nevada in 1987. His complaint, brought under 42 U.S.C. § 1983, sought damages and injunctive relief based on his involuntary exposure to secondary cigarette smoke or environmental tobacco smoke ("ETS") in the Nevada State Prison in Carson City. Named as defendants were the warden and other Carson City prison offi-

cials; some of them no longer hold those offices, but for convenience we refer to them and, where appropriate, their successors as petitioners.

McKinney, a non-smoker, complained that he was forced to share a cell with a prisoner who smoked five packs of cigarettes a day and that prison officials refused to move him to a single cell or to house him with a non-smoking cellmate, despite his repeated complaints that forced inhalation of smoke was damaging his health. He also objected to the fact that smoking is allowed in the prison library, as it is everywhere in the prison, except the infirmary and the culinary. Two-thirds of the prisoners at Carson City prison smoke (Pet. App. C-19-C-20).

The case was tried to a jury before a magistrate who viewed the complaint as stating two Eighth Amendment claims: (1) deliberate indifference to McKinney's existing medical problems, such as nosebleeds, sore throats and similar cold symptoms, and (2) a constitutional right to be housed in a smoke-free environment (Pet. App. D-2-D-3, C-4).

The magistrate directed a verdict in favor of petitioners after hearing McKinney and other inmates testify as to his first claim, involving his current medical symptoms and their treatment. She acknowledged that the Eighth Amendment bars petitioners from being deliberately indifferent to McKinney's needs, but found no evidence of a serious, existing medical need which was not receiving medical care. She noted the absence of expert or medical testimony showing that petitioners had proximately caused any present injuries and a lack of proof that exposure to ETS could cause the various symptoms of which McKinney complained (Pet. App. C-4, D-7-D-10).

His second claim was also found to be meritless, with the magistrate holding that, as a matter of law, McKinney had no right to be free from cigarette smoke while serving in prison (Pet. App. D-5). In reaching this result, however, the magistrate excluded all evidence except that relating to McKinney's current medical symptoms, including documents relating to the potential future health effects of exposure to ETS (Pet. App. C-4).

The court of appeals unanimously reversed as to this second claim, which is the focus of the petition. The court held that the magistrate erred in framing that issue in "all-or-nothing terms," as that approach "excluded a valid eighth amendment claim lying between these two extremes: that compelled exposure to levels of ETS that pose an unreasonable risk of harm to human health constitutes cruel and unusual punishment" (Pet. App. C-5). Thus, the court ruled that a "reasonable factfinder could conclude that the adverse health effects associated with ETS exposure would be especially severe for McKinney" (Pet. App. C-20).

In holding that the Eighth Amendment may be violated if prisoners are exposed to an "unreasonable" risk to their health, the court of appeals cited scientific evidence, including a 1986 Surgeon General's Report which stated that "a clear judgment can now be made: exposure to ETS is a cause of lung cancer. The data in this Report establish that a substantial number of the lung cancer deaths that occur among nonsmokers can be attributed to involuntary smoking" (Pet. App. C-17). The Report added that the scientific case against involuntary smoking as a health risk "is more than sufficient to justify appropriate remedial action, and the goal of any remedial action must be to protect the nonsmoker from environmental tobacco smoke" (Pet. App. C-18). The court also cited a 1990 draft report by the Environmental Protection Agency which estimated that some 3800 deaths each year among nonsmokers in the United States could be attributed to ETS, which EPA classifies as a Group A (known human) carcinogen, along with such substances as arsenic, asbestos, benzene, chromium compounds and vinyl chloride (Pet. App. C-18-C-19).

In assessing the evolving standards of decency in this area, the court of appeals noted that there were widespread bans on smoking in public places and confined areas, adding that: (1) The federal prison system had moved to protect non-smokers; (2) The American Jailers Association, representing 6500 jail administrators, has backed a ban on smoking in prisons; and (3) As of May 1990, county and state corrections departments in 13 states had either banned or were considering a ban on cigarette smoking in prison (Pet. App. C-27-C-29).

The court of appeals thus concluded that McKinney had stated a claim for injunctive relief and that he "should be allowed to present evidence regarding the level and degree of his exposure to ETS and whether that degree of exposure is sufficient to create an unreasonable risk of harm to his health" (Pet. App. C-30). Citing a lack of evidence upon which to base any conclusions about which conditions actually posed an unreasonable risk of harm to McKinney's health, the court remanded to the district court for factfinding on these issues (Pet. App. C-47 n.29).[1]

Petitioners sought rehearing and suggested a need for *in banc* review. The panel denied rehearing on 14 May 1991, noting that no judge had requested a vote on the suggestion for *in banc* review (Pet. at 4).

Petitioners then sought review in this Court (No. 91-269). On 15 October 1991 the Court granted the petition, vacated the judgment and remanded the case to the court of appeals for further consideration in light of the intervening decision in *Wilson v. Seiter*, 111 S. Ct. 2321 (1991). *Helling v. McKinney*, 112 S. Ct. 291 (1991), *as amended*, *id.* at 963 (1992)(Pet. App. B-1-B-2).

Wilson clarified that an Eighth Amendment challenge to prison conditions consists of two parts: an objective component, which asks whether the injury complained of is sufficiently serious

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1 The court added that the trial court should consider appointing counsel to represent McKinney on remand (Pet. App. C-30). In fact, a Nevada attorney has agreed to represent him in the district court on remand (Pet. App. A-6).

The court of appeals also resolved a number of issues which are not before this Court. Specifically, it upheld the magistrate's entry of a directed verdict as to McKinney's first Eighth Amendment claim about his existing medical symptoms (Pet. App. C-39-C-40); ruled that he could not pursue a damages claim because petitioners enjoy qualified immunity for their actions (Pet. App. C-31); held that a Nevada anti-smoking law applies to state prison libraries (Pet. App. C-32-C-35); and upheld the magistrate's denial of McKinney's request for preparation of a trial transcript at state expense (Pet. App. C-40-C-42). The court also reversed the magistrate's ruling that she lacked the power under Rule 706, Fed. R. Ev., to appoint an expert to testify, at state expense, on smoking and health issues, and it recommended that such an expert be appointed on remand (Pet. App. C-35-C-38).

to warrant constitutional protection, and a subjective component, which asks whether prison officials acted with a sufficiently culpable state of mind. *Id.* at 2324. *Wilson* specified that the subjective element is met in prison condition cases only if the prisoner can satisfy the standard used in cases alleging a failure to address "serious medical needs," *i.e.*, "deliberate indifference" to the prisoner's condition. *Id.* at 2323.

On remand, the court of appeals received supplemental briefs, and on 27 March 1992 it issued an order reinstating its previous judgment (Pet. App. A-1-A-7). The court observed that by establishing a subjective component to McKinney's Eighth Amendment claim, *Wilson* "simply adds another element to [that] claim which McKinney must prove" (Pet. App. A-6), adding that *Wilson* did "not vitiate our determination of what satisfies the objective component" of his claim (Pet. App. A-5). The court did, however, modify its earlier opinion in light of *Wilson* to make clear that "hous[ing] a prisoner in an environment that exposes him to levels of ETS that pose an unreasonable risk of harming his health constitutes the objective component of McKinney's Eighth Amendment claim" (Pet. App. A-5-A-6), though the prisoner must also satisfy the subjective requirement in order to prevail. Accordingly, the case was remanded to the district court "for further proceedings consistent with this court's previous opinion" and with *Wilson* (Pet. App.).

Before explaining why review should be denied, we are obliged to note a factual development which the petition fails to mention. About the time the court of appeals issued its first opinion allowing McKinney to pursue a claim for injunctive relief regarding conditions at the Carson City prison, he was moved to Ely State Prison. Thus, the record contains no facts regarding the conditions of his confinement at Ely with respect to his exposure to cigarette smoke, nor is it clear how long he will remain there. We noted this fact in opposing the earlier petition, and petitioners replied that they reserved the right to transfer him back to Carson City, and thus the controversy remained a live one. Reply Memorandum for Petitioners, *Helling v. McKinney*, No. 91-269, at 3-4. However, we note that McKinney is still at Ely and that most of the current petitioners appear to have responsibilities only at

Carson City. These facts, as well as the fact that McKinney will likely have to amend his complaint in any event to respond to the intervening decision in *Wilson*, argue against granting review in this case.

REASONS FOR DENYING THE WRIT

Contrary to petitioners' assertions, the circuits are not in conflict, and the issues presented do not warrant review, which in any event would be premature, as the court of appeals merely held that McKinney's handwritten, *pro se* complaint stated a claim for relief which is cognizable under the objective component of the Eighth Amendment. The district court received no evidence on this point or on the subjective portion of any such claim, as *Wilson* requires. Thus, the implications of the decision below are uncertain at this time.

1. Before answering the specific arguments raised by petitioners, it may be useful to address a theme which seems to underlie the petition, namely, that allowing the decision to stand would have a devastating effect on prison systems in terms of cost, prison management and new litigation. *See* Pet. at 10. At this point in the case, and on this record, there is no basis to conclude that the decision below will have that type of impact, either in Nevada or elsewhere, and there are several factors which undercut the claim of wide-spread disruption.

First, the entire federal prison system has already acted to separate non-smoking prisoners from cigarette smokers. *See* 28 C.F.R. §§ 551.160-551.163 (federal prison officials must designate smoking and non-smoking areas and, "[t]o the extent practicable," place non-smoking inmates in non-smoking quarters; double celling of smoker and non-smoker to be "avoided except where impractical due to circumstances, and then may be done only for limited duration"). The same is also true in various state systems, as the court of appeals noted. *See* Pet. App. C-27-C-29); *see also West v. Wright*, 747 F. Supp. 329, 332 (E.D. Va. 1990) (describing steps to protect non-smokers in state prison system). Separating prisoners in this fashion should significantly reduce the number of complaints from non-smoking prisoners.

Moreover, even in state prison systems within the Ninth Circuit, where the ruling below applies directly, some systems already protect non-smoking prisoners. Alaska's law against smoking in public places expressly bars smoking in "a correctional facility." Alaska Stat. § 18.35.300(10)(1991). In Idaho, Executive Order No. 92-2 recently established a no-smoking policy in state buildings and gave responsibility for setting policy to local prison heads; the Idaho Department of Corrections advises that each warden in that state has designated non-smoking areas in housing units and common use areas for inmates.

In Montana, the warden of the Montana State Prison adopted a Policy Statement (No. MSP 03-001, effective 15 December 1986 and revised in September 1989) which does not adopt a smoking/non-smoking restriction for inmate housing, but declares inmate common buildings as non-smoking areas, adding (at 2) that "[p]assive smoke inhalation is a health hazard." And the Washington State Department of Corrections issued Division Directive No. DOP 190.500, effective 1 January 1989, which eliminated smoking within all inmate working and break areas and added that, when possible, "an attempt will be made to house non-smoking inmates together" or to establish non-smoking tiers, tier sections or cells if enough prisoners are non-smokers.

Thus, the practical consequences of the decision below are likely to be limited, particularly since inmates must not only prove an objective violation, but must satisfy in addition the subjective standard in *Wilson v. Seiter*. We also turn now to the particular bases cited for granting review.

2. The petition tries (at 12-18) to show that the circuits are split, but a close reading of the cited cases demonstrates that there is no conflict between them and the decision below with respect to the Eighth Amendment issue posed here. Petitioners rely heavily on the recent *in banc* opinion in *Clemmons v. Bohannon*, 956 F.2d 1523 (10th Cir. 1992), but despite some superficial similarities, the case is distinguishable.

Clemmons upheld a grant of summary judgment against a prisoner who complained of his confinement with a smoking

cellmate. *Id.* at 1525. There, as here, the court found no evidence that he was *presently* suffering serious medical harm. *Id.* at 1526-27. The prisoner also made a second claim (arguably similar to McKinney's) that this exposure to cigarette smoke "may lead to more serious carcinogenic effects." *Id.* at 1527. But at this juncture, *Clemmons* diverges from this case in several key respects.

The prisoner in *Clemmons* was allowed to submit evidence on his second claim in opposition to the state's summary judgment motion, but his evidence consisted merely of a flyer from the local chapter of the American Lung Association about the noxious ingredients in cigarette smoke, a news article mentioning the Surgeon General's finding about passive smoking, and an article about the General Services Administration's change in policy to favor nonsmokers in government facilities, none of which helped establish how the particular conditions of his particular confinement might adversely affect him. *Id.* at 1527.

Summary judgment for the prison officials might well be appropriate in that case on that record, but *Clemmons* cannot be stretched as far as petitioners seek here, namely, to extinguish the possibility of *any* cause of action (no matter what evidence an inmate may muster), particularly when, as here, the magistrate denied McKinney the opportunity to introduce *any* evidence on this claim (Pet. App. C-4).

Thus, the holding in *Clemmons* does not establish that a prisoner cannot succeed even if he were able to present competent, admissible evidence about the health hazard presented by his exposure to cigarette smoke. To be sure, *Clemmons* did add *dicta* in response to the dissenting opinion to the effect that the Eighth Amendment "does not sweep so broadly as to include possible latent harms to health," and that neither this Court nor the Tenth Circuit has held that "a potential, distant harm to a prisoner's health is a serious medical need." *Id.* at 1527. But *Clemmons* did not cite any case which expressly bars such a result, nor did it address cases such as *Powell v. Lennon*, 914 F.2d 1459, 1464 & n.10 (11th Cir. 1990), which allowed a prisoner to pursue an Eighth Amendment claim based upon deliberate indifference

to his request for placement in an asbestos-free environment, or *Franklin v. State of Oregon*, 662 F.2d 1337, 1346-47 (9th Cir. 1981), which allowed a claim to proceed when an inmate suffering from throat cancer was housed with a cigarette smoker.

For these reasons, review is not warranted on the basis of a conflict with *Clemmons*. Moreover, if the Court did wish to consider application of the Eighth Amendment to health hazards with long latency periods, this case is not a suitable vehicle for exploring them, arising as it does on a decision holding only that there may be a cause of action in such circumstances, with no other cases analyzing that precise issue, especially in light of *Wilson v. Seiter*.

The other appellate rulings cited by petitioners also do not conflict with the decision below. In *Johnson v. Moore*, 926 F.2d 921 (9th Cir. 1991), the authorities responded to the prisoner's complaint of double celling with a heavy smoker by moving him to another cell; McKinney's complaint is that the authorities did *not* respond to his objection about double celling with a five-pack-a-day cellmate. *Kensell v. State of Oklahoma*, 716 F.2d 1350 (10th Cir. 1981), did not involve the Eighth Amendment, and *Wilson v. Lynaugh*, 878 F.2d 846 (5th Cir. 1989), involved a prisoner's effort to relitigate his 1980 defeat in a case challenging exposure to secondary cigarette smoke, with the focus of the opinion on the res judicata issue. Finally, *Steading v. Thompson*, 941 F.2d 498 (7th Cir. 1991), can be distinguished because it purported to be a class action seeking to create a smoke-free environment in Illinois prisons, and it lacked the sort of focused claim which the court of appeals recognized here. Indeed, *Steading* took pains to add that prisoners "who can attribute their serious medical conditions to smoke, are entitled to appropriate medical treatment, which may include removal from places where smoke hovers," but that was not the claim the prisoner was pursuing there. *Id.* at 500.

Nor do the district court decisions cited by petitioners (at 18-22) bolster the case for review. Some hold that an Eighth Amendment claim may be stated in some situations, *Beeson v. Johnson*, 668 F. Supp. 498 (E.D.N.C. 1987); *Avery v. Powell*, 695 F. Supp. 632 (D.N.H. 1988), while those reaching an opposite conclusion were correctly distinguished by the court of appeals

(Pet. App. C-44 n.3) on the ground that the complaints there asserted a more sweeping right to an utterly smoke-free environment. *Gorman v. Moody*, 710 F. Supp. 1256 (N.D. Ind. 1989); *Caldwell v. Quinlan*, 729 F. Supp. 4 (D.D.C.), *aff'd mem.*, 923 F.2d 200 (D.C. Cir. 1990), *cert. denied*, 112 S. Ct. 291 (1991). Another case was dismissed based on pleading deficiencies, *Lee v. Carlson*, 645 F. Supp. 1430 (S.D.N.Y. 1986), while in *West v. Wright*, *supra*, the court was "not called upon to determine whether the indefinite confinement of a nonsmoking prisoner against their [sic] will in a cell with a smoker implicates the Eighth Amendment" because it was "undisputed" that the prison authorities had "implemented significant safeguards for the protection of nonsmokers, including the opportunity to be assigned to a nonsmoking cell with a fan, output and input vents, and a window that may be opened." 747 F. Supp. at 332.

3. The balance of the petition contains a potpourri of objections to the way the court of appeals decided this case, none of which is sufficiently weighty to warrant this Court's consideration. If anything, these objections, when taken together, suggest that this case is quite factbound, and the incomplete nature of the record argues for letting it proceed next in the district court, not this Court.

Petitioners first chide the court of appeals (at 23-25) for not reversing itself based on the fact that the Nevada legislature responded to the first appellate ruling here by promptly amending its law barring smoking in "public buildings" to declare that facilities used to house or serve inmates are not "public buildings" under that law (Pet. App. F-1, F-7). That law has no effect on McKinney's claim because a legislative determination that smoking should not be banned entirely from a state prison system does not, as petitioners claim, alter the mandates of the Eighth Amendment or allow prison officials to disregard specific complaints about unhealthy conditions. *See Franklin v. State of Oregon*, *supra* (double celling heavy smoker with prisoner suffering from lung cancer).

Moreover, the new statute appears to be aimed at the portion of the decision below which specifically held, based on an

advisory opinion of the Nevada Attorney General, that the pre-existing ban on smoking in libraries applied to prison libraries (Pet. App. C-32-C-35). The effect of this new law on that portion of McKinney's complaint dealing with smoking in the library is thus an issue which is best suited to resolution by the district court, and the court of appeals was surely on solid ground in remanding the case for that purpose.

Some of petitioners' other complaints (that the issues framed by the magistrate were those framed by the parties and that McKinney's phrasing of the issue presented on appeal is broader than the issue actually decided, *see* Pet. at 25-28), really amount to little more than petitioners' disagreement with the court of appeals' decision to treat McKinney's handwritten, *pro se* papers with the deference often accorded *pro se* litigants, rather than applying a more rigorous standard of pleading and proof that might have been appropriate had he been represented by counsel. The broad Eighth Amendment claim which the magistrate found insufficient as a matter of law, and McKinney's request for reversal of that ruling, reasonably embrace the more focused Eighth Amendment claim identified by the court of appeals, and there is no basis for granting review on this ground.

Along the same line, petitioners complain that the court of appeals unfairly deprived them of an opportunity to submit detailed briefs before holding that an Eighth Amendment claim may exist between the two extremes cited by the magistrate, claiming that they would have produced "evidence" on the difficulties they perceive in "classifying and housing inmates within the limitations of budget, facilities, and securities concerns." Pet. at 28. Apart from the fact that petitioners never sought to fill that void on remand from this Court, appellate courts do not sit to receive evidence, and to the extent that petitioners claim (at 29) that they have (unspecified) scientific or other evidence which would rebut an objective claim under the Eighth Amendment, they are really saying that there is a genuine factual dispute, which is better addressed by the district court, not this Court.

4. The petition also asserts as a separate ground for granting review that the decision below misapplied *Wilson v. Seiter*, but the

discussion of *Wilson* merely restates earlier points without adding anything new which would warrant granting review.

Petitioners argue (at 29-33) that the subjective element in *Wilson* was not met here because McKinney failed to show that petitioners acted with the requisite intent to violate his Eighth Amendment rights. They cite that portion of the magistrate's opinion which dismissed McKinney's claim of inadequate medical care (Pet. App. D-7-D-10), but that discussion is not germane because it involves his *first* claim, which focused on petitioners' response to McKinney's then existing cold-like symptoms. No evidence was heard on his *second* claim about prison conditions (the subject of this petition) because the magistrate held, as a matter of law, that McKinney had failed to state a claim for relief.

As for the objective element, petitioners essentially restate (at 33-37) their disagreement with the decision below. Their principal objection seems to be that McKinney made no showing that "his health or safety had been seriously threatened by exposure to secondary tobacco smoke" (Pet. at 35)(emphasis omitted), conveniently ignoring the fact that the magistrate did not allow him to present evidence on that issue. And to the extent they complain of a lack of opportunity to present "their own evidence to contest McKinney's legally insufficient facts" (*id.*), a remand to the district court will provide them with precisely that opportunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 1992

Supreme Court, U.S.
FILED
JUN 25 1992
OFFICE OF THE CLERK

(4)

No. 91-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DONALD L. HELLING, et al.,
Petitioners,

v.

WILLIAM McKINNEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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I.

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II.

ARGUMENT

It has long been recognized that the details of managing correctional facilities should be left to prison administrators, in deference to the unique problems and limitations which daily confront prison personnel. Although inmate civil rights litigation is important in identifying and maintaining the constitutional rights of inmates not inconsistent with the safe and secure operation of our nation's prisons, the courts are flooded with petitions from prisoners claiming cruel and unusual punishment has been inflicted upon them for reasons which are a far cry from what the Eighth Amendment was intended to encompass.

In this case, McKinney is essentially asking the federal courts to become involved in substituting its judgment on how best to house and classify dangerous and manipulative inmates for that of pri-

son administrators. Claiming to be a non-smoker, he wants this court to decide that he is entitled to his standards of comfort at all times he is in prison. Although he suffers from no serious medical need requiring a non-smoking environment, and although he failed to present in his case-in-chief at trial any evidence his health was at risk by exposure to secondary tobacco smoke, and although he presented no evidence of deliberate indifference on the part of prison officials, he nonetheless asks the Court to declare that he has a right to a relatively smoke-free prison environment.

Petitioners ask this Court to find that the Eighth Amendment prohibition against cruel and unusual punishment does not include regulation by the judiciary of the levels of secondary tobacco smoke in prison, and that in the absence of balancing the many risks in the specific

health problems, housing and classification of inmates are decisions best left to prison officials.

RESPONSE TO STATEMENT OF THE CASE

Petitioners shall comment on Respondent's Statement of the Case.

At the time of trial, smoking generally was permitted in all parts of the prisons within the State of Nevada except for the infirmary and the culinary. Since then, some changes have occurred. Smoking is not permitted in the law libraries, and the wardens of each facility have established some smoking and non-smoking areas consistent with security considerations and the limitations of existing facilities. Inmate requests to be housed with non-smokers are accommodated where feasible and consistent with security and other concerns. Nonetheless, smokers and non-smokers are housed with each other for varying periods of

time, and there are common areas where non-smokers are exposed to secondary tobacco smoke.

Petitioners point out that the U.S. Magistrate before whom the trial was conducted addressed the issues as presented to her by the parties in their joint pretrial order. (See Petition at p. 6)

Respondent relies upon a statement made by the Ninth Circuit Court of Appeals that the U.S. Magistrate excluded any evidence proffered by Petitioner McKinney regarding the potential health effects of ETS exposure. (Pet. App. C-4). However, Petitioners respectfully disagree with the accuracy of this statement, and can find no evidence in the record to support it. The U.S. Magistrate, in a pretrial ruling, denied McKinney's request that the Court appoint an expert for him. He was not precluded from presenting admissible evidence at

trial in support of his claims; rather, he simply failed to do so. The U.S. Magistrate stated, in the Order Entering Judgment in Favor of Defendants:

> McKinney completely failed to adduce any expert testimony or provide any medical evidence which would prove the Defendants' acts were the proximate cause of his injuries. Nor was there any medical proof or testimony that such exposure to cigarette smoke could even cause such symptoms. [Emphasis added]
> (Pet. App. D-9, D-10)

Respondent refers to the sources relied upon by the Ninth Circuit to support its findings that exposure to secondary tobacco smoke is a health risk and that some states and counties either had or were contemplating some type of smoking ban in correctional facilities. The Ninth Circuit's conclusions, however, were made without having given either party the opportunity to brief the issue on appeal. The only authorities cited were those supporting the Ninth Circuits'

conclusion that exposure to secondary tobacco smoke is a health risk. There were no references to studies which concluded the health risk is minimal or dependent on other factors. There was no reference made to the fact that many legislative restrictions on smoking in public areas exclude correctional facilities. (See Pet. App. C-14 to C-19)

Respondent points out the Ninth Circuit originally remanded the case to the district court for further factfinding, based upon the lack of evidence on whether the conditions of McKinney's confinement presented an unreasonable risk to his health. (Pet. App. C-47, N.29). Again, McKinney had his opportunity at trial to offer such evidence, and failed to do so. (Pet. App. D-9, D-10). He is not entitled to a second chance.

Respondent paraphrases the statement of the Ninth Circuit on remand that:

> "...by establishing a subjective component to McKinney's Eighth Amendment claim, Wilson 'simply adds another element to [that] claim which McKinney must prove' (Pet. App. A-6), stating that Wilson did 'not vitiate our determination of what satisfies the objective component' of his claim..."

(See Opposition at p. 5).

The U.S. Supreme Court did not "add" an element; rather, the Court clarified what standard a plaintiff must meet to satisfy the existing subjective component of an Eighth Amendment claim involving prison conditions. The subjective component was not newly established in Wilson v. Seiter, 111 S.Ct. 2321 (1991) in fact, the Court took pains to point out that Whitley v. Albers, 475 U.S. 312, 106 S.Ct. 1078 (1986), made it clear it has always been necessary to "...inquir[e] into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment."

. . .

Wilson, at p. 2324, citing Whitley v. Albers.

Respondent's statement that "The district court received no evidence on this point [whether McKinney stated an Eighth Amendment claim on the issue of secondary tobacco smoke] or on the subjective portion of any such claim, as Wilson requires" is misleading. (See Opposition at p. 6)

Evidence can only be received if it is offered. McKinney, in presenting his case in chief, had every opportunity to introduce admissible evidence on this point, but did not do so. He clearly knew it was plaintiff's responsibility to present such evidence, since he had twice filed pretrial motions asking the U.S. Magistrate to appoint an expert for him to testify regarding the effects of secondary tobacco smoke, which she denied. . . .

(See Appendices E, F, G and H to Pet. App. in Case No. 91-269)

Respondent states, without supporting facts, that attempts to segregate smoking and non-smoking inmates, such as in the federal prison system, "[t]o the extent practicable" should significantly reduce complaints from non-smoking inmates. He cites examples of states which have specific policies to attempt to separate smoking and non-smoking inmates where possible. (See Opposition at pp. 6-7). Petitioners submit this is not likely to have much effect on the burgeoning inmate civil rights complaint industry. If exposure to undefined "unhealthful" levels of secondary tobacco smoke states a claim for cruel and unusual punishment, inmates who spend ten minutes in a cell with an inmate who smokes one cigarette will file a civil rights claim. Smoking inmates who must wait half an hour before they

can leave a non-smoking area will likewise file a civil rights claim.

It appears Respondent is arguing that because he has been housed at a different correctional facility, this case is not ripe for controversy. (See Opposition at p. 5). This argument is not well-taken for two reasons. State prisoners often are transferred from facility to facility, sometimes up to several times per year, and for a variety of reasons. McKinney is as likely to be transferred as any other inmate. Second, the possibility that McKinney will be housed with a smoker or otherwise exposed to secondary tobacco smoke is as likely at the Ely State Prison as it is at the Nevada State Prison. The problems faced by prison administrators in classifying and housing inmates are similar, regardless of in which facility an inmate is presently confined.

REASONS FOR GRANTING THE WRIT

Respondent disputes Petitioners' argument that permitting the Ninth Circuit's decision to stand will not have a significant effect upon the cost of maintaining prisons, will not encourage new litigation, and will not adversely affect prison management. (See Opposition at p. 6). Petitioners submit this ignores the realities of managing prison systems. Prisons house inmates who are among the most violent, deceitful, unstable and manipulative individuals in our society. Smoking and non-smoking inmates alike are well-known for attempting to manipulate cell assignments through various methods, including claiming non-smoking status. Prison administrators must balance the relative risks of all cell assignments, within the limitations of available facilities. For example, is there a potentially greater risk of harm by housing a

black non-smoker with a non-smoking AIDS patient, or with a non-smoking white supremacist, or with a smoker who appears otherwise compatible.

Petitioner submits Respondent's speculation that complaints from non-smoking prisoners will be reduced by segregating smoking and non-smoking prisoners is naive, and demonstrates a lack of understanding about the nature of the majority of inmate civil rights litigation. As soon as inmates perceive that a "right" exists, they will seek to test all potential parameters of that right through litigation. They will exploit and hamper prison administrators who are attempting to manage an already complicated classification process.

Respondent's attempt to distinguish the many cases which have addressed the problem of non-smoking inmates being housed with smoking inmates merely under-

scores the need for this Court to resolve the issue of whether an inmate's exposure to secondary tobacco smoke, at any particular level or for any particular length of time, in the absence of an existing medical problem, creates a cause of action under the Eighth Amendment.

Of the four circuit courts which have considered this issue in the past few years, only one, the Ninth Circuit, has decided that an inmate can state an Eighth Amendment claim by alleging, in the absence of related medical problems, exposure to unhealthy levels of secondary tobacco smoke. The other circuits disagree.

The Tenth Circuit in Clemmons v. Bohannon, 956 F.2d 1523, 1527-1528 (10th Cir. 1992) [Clemmons II] specifically stated the inmate's exposure to secondary tobacco smoke, though perhaps restrictive and harsh, was nonetheless "...of a less-

er magnitude than those cases that have found an Eight Amendment violation due to deliberate indifference to serious medical need."

Once again, Petitioner's reliance on the Ninth Circuit's statement that the U.S. Magistrate denied McKinney the chance to introduce any evidence on his secondary tobacco smoke claim is in error. It was McKinney's burden to produce competent, admissible evidence. The U.S. Magistrate declined to exercise her discretion to find and appoint expert witnesses to help him, but that did not preclude him from finding his own witnesses.

Respondent's reference to Franklin v. State of Oregon, 662 F.2d 1337 (9th Cir. 1981) is correct insofar as an inmate was permitted to proceed with his Eighth Amendment claim when housed with a cigarette smoker, however the inmate suffered . . .

from a medical condition, throat cancer, and the Court stated:

> If these conditions, however, were as threatening to Franklin's health as he alleged and if they were the result of deliberate indifference on the past of the prison officials, then Franklin arguably has alleged cruel and unusual punishment under the Eighth Amendment.

Franklin, at p. 1347.

Thus, at that time, the Ninth Circuit permitted an Eighth Amendment claim based on exposure to secondary tobacco smoke only where a medical condition existed. And certainly it was clear that deliberate indifference was required to be established by the plaintiff.

Although the primary issue in Wilson v. Lynaugh, 878 F.2d 846 (5th Cir. 1989) was on the res judicata issue, nonetheless, the Fifth Circuit made clear its opinion of the Eighth Amendment issue by quoting with approval from Gorman v. Moody, 710 F. Supp. 1256 (N.D. Ind. 1989), which held that where a plaintiff

did not allege a serious medical condition exacerbated by exposure to tobacco smoke, no Eighth Amendment claim is stated.

The Seventh Circuit, in Steading v. Thompson, 941 F.2d 498 (7th Cir. 1991) quite clearly stated its view that exposure to secondary tobacco smoke is common in society, and it was ludicrous to believe either restauranteurs or prison administrators intended to punish others with smoky air. Steading reaffirmed that where a serious medical condition is alleged, only then can an Eighth Amendment Claim be stated.

Respondent states that Nevada's law exempting correctional facilities from laws regulating smoking in public places has no effect on whether McKinney can proceed with an Eighth Amendment claim. (See Opposition at p. 10). Petitioners point out the exemption is illustrative

of the evolving standards of decency on this issue which Petitioners believe the Ninth Circuit should have taken into account in determining whether an inmate's exposure to secondary tobacco smoke constituted cruel and unusual punishment.

Respondent states it was proper for the Ninth Circuit to have treated McKinney's pro se appeal with deference, thus justifying the Circuit Court's decision to broaden the issues without giving the parties the opportunity to address them in their briefs. (See Opposition at p. 11). Petitioners respectfully point out that although pro se, McKinney was then, and continues to be, an experienced inmate litigator. An examination of the docket of the United States District Court for Nevada will reveal his name as a plaintiff in over thirty-five civil rights cases.

. . .

Respondent states no evidence was heard at trial on his claim about prison conditions because the U.S. Magistrate held that McKinney, as a matter of law, had failed to state a claim for relief. This ruling, however, was not made until after McKinney had presented his case in chief. (Pet. App. D). The U.S. Magistrate specifically noted that McKinney failed to present "...any medical proof or testimony that such exposure to cigarette smoke could even cause such [cold-like] symptoms." (Pet. App. D-9, D-10)

McKinney has had his day in court. He was given the opportunity to prove his case at the district court level, and he was unable to satisfy his burden of proof, resulting in a directed verdict for Petitioners. It would be an unfair burden and expense to retry this case now, and it would not resolve the issue of whether inmate exposure to secondary

tobacco smoke can state a valid Eighth Amendment claim.

Essentially, three other circuits are in conflict with the Ninth Circuit, which stands by its original decision despite this Court's remand following Wilson v. Seiter. In addition, numerous federal district courts have considered this issue and come to differing conclusions.

It is clear from the number of states and territories which have joined the brief amicus curiae that a resolution of this question is timely and compelling.

As pointed out by the amicus brief and in the petition, McKinney at trial failed to present credible evidence to satisfy either the subjective or objective components of an Eighth Amendment prison conditions claim. The Ninth Circuit erred in applying Wilson v. Seiter on remand from this Court.

. . .

Finally, this Court should resolve the constitutional question of whether, in the absence of serious medical problems, inmates' exposure to secondary tobacco smoke which may pose a health risk violates the right to be free from cruel and unusual punishment.

III.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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No. 91-1958

Supreme Court, U.S.
FILED
JUN 17 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,

Petitioners,

vs.

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Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA, WEST VIRGINIA, WISCONSIN, AND WYOMING, AND THEDISTRICT OF COLUMBIA, THE TERRITORY OF GUAM, AMERICAN SAMOA, THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, AND THE VIRGIN ISLANDS IN SUPPORT OF PETITIONERS

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No. 91-1958

In The

Supreme Court of the United States

October Term, 1991

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,

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WILLIAM MCKINNEY,

Respondent.

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The amici States enumerated above, by their respective Attorneys General, submit this brief in support of the petition for certiorari to the United States Court of

Appeals for the Ninth Circuit filed by the Attorney General of Nevada from the order entered in the proceeding below on March 27, 1992, reinstating its original decision of February 1, 1991. The Ninth Circuit's most recent decision reinstates a judgment which had been vacated by this Court and remanded for further review in light of *Wilson v. Seiter,* 111 S. Ct. 2321 (1991).

INTEREST OF AMICI CURIAE

This Court has recognized that "[p]rison administrators [] should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish,* 441 U.S. 520, 547 (1979). The amici States thus have a significant interest in seeing that their administrative discretion to manage and operate their prison and jail facilities in the most efficient and effective manner consistent with legitimate security concerns not be unduly hampered by court-imposed orders requiring them to either ban smoking completely in prison or segregate prisoners according to their smoking or non-smoking preferences. Serious security problems could arise under either scenario, as a complete ban would physically and psychologically disturb many smoking prisoners, making them more prone to violent behavior, while attempting to segregate inmates according to smoking status could require ignoring important security concerns in assigning detainees to cells.

Furthermore, the amici States have a very significant interest in holding down the immense costs of building

and operating prisons and jails within their States. The decision below, if allowed to stand, would likely lead to even greater drains on State treasuries as segregating prisoners according to their smoking preferences would require either new prison facilities or extensive renovations. A complete ban on smoking would require more medical personnel to treat addicted smokers suffering withdrawal symptoms and/or more prison guards and other staff to deal with the likely increase in prison unrest.

SUMMARY OF THE ARGUMENT

This Court should grant the writ of certiorari in this case because the decision below determined a significant issue of Federal Constitutional law that has not been decided by this Court, and will have a severe impact upon the States' financial status, prison administration and security, and the welfare of the prisoners themselves. Furthermore, the ruling below is in direct conflict, in its analysis of both the objective and subjective components of Eighth Amendment claims, with numerous decisions of other federal courts of appeals that have rejected identical or similar cruel and unusual punishment claims.

Moreover, the Ninth Circuit's decision, in remanding for further consideration of the subjective component and not concluding, on the record, that the element was not satisfied, violated this Court's recent ruling in *Wilson v. Seiter,* 111 S. Ct. 2321 (1991), and improperly heeded the mandate, because plaintiff plainly failed to establish "deliberate indifference" even under its most lenient interpretation.

Furthermore, because this Court has never held, absent any present injury to a particular inmate, that conditions that merely enhance the risk (especially where that risk is subject to serious debate) of a prisoner contracting a disease sometime in the future constitute cruel and unusual punishment, the Ninth Circuit also erred in holding that the objective component of an Eighth Amendment violation was met.

Finally, the Ninth Circuit's separate decision holding that the Nevada anti-smoking statute creates a liberty interest in smoke-free prison libraries protected by the Due Process Clause unjustifiably expands *substantive* due process protection to interests created solely by State law.

ARGUMENT

I. The Issue of Whether the Cruel and Unusual Punishment Clause Requires Prison Administrators to Accomodate the Smoke-free Air Preferences of Non-smoking Inmates raises an Extremely Important Question of Federal Constitutional Law that Has Not Been but Should be Decided by this Court.

The impact of the decision below on the fiscal solvency of the States and the security of their prison facilities is potentially very severe. Because the proportion of smokers in prisons nationwide is approximately ninety per cent, *see* N.Y. Times, July 9, 1990 at A10, col. 5, virtually all prisons in the Nation will, if the judgment below is permitted to stand, be faced with major institutional and/or economic crises if non-smoking prisoners can demand smoke-free, or less smoky, air.

For this reason alone, putting aside the important constitutional question, certiorari should be granted to review a decision having such potentially devastating consequences.

The constitutional question whether it is cruel and unusual punishment to subject prisoners to levels of cigarette smoke that cause them no immediate or short-term ill effects, on the ground that it might endanger their health at some unspecified point in the future, is an important one that has not been addressed by this Court. In light of the high rate of smoking among inmates, thousands of non-smoking inmates are potentially being subjected to significant levels of secondhand tobacco smoke and thus they, too, have an interest in having this question resolved by this Court. Indeed, *all* prisoners will be greatly affected by resolution of this important issue, as a ruling upholding the decision below could lead to smoking bans which would be stressful and disturbing to the majority smoking inmates, and which not inconceivably could raise their own cruel and unusual punishment questions.

In short, certiorari should be granted so that this Court can resolve a constitutional problem that is currently having, and will continue to have, a most severe impact upon State fiscal responsibility, prison security, and prisoner welfare.

II. The Ruling Below is in Direct Conflict with Decisions of other Courts of Appeals as to both the Objective and Subjective Components of Cruel and Unusual Punishment Claims.

On February 14, 1992, an *en banc* panel of the United States Court of Appeals for the Tenth Circuit issued a

decision, reversing an earlier 3-judge panel decision, that directly and irreconcilably conflicts with the Ninth Circuit's decision in *McKinney*. *See Clemmons v. Bohannon*, 956 F.2d 1523 (10th Cir. 1992) (en banc). In *Clemmons*, the Court reached two distinct rulings, one on the objective component and the other on the subjective component of Eighth Amendment violations, each conflicting with corresponding portions of *McKinney*.

First, and most significantly, *Clemmons* held that the objective element of an Eight Amendment violation is not satisfied by evidence that forced exposure to certain levels of secondhand tobacco smoke poses a significant risk of future cancer. Some *current* serious adverse medical consequences from the exposure are required.

> . . . The Eighth Amendment does not sweep so broadly as to include possible latent harms to health. . . .
>
> . . . .
>
> Neither the Supreme Court nor this court has ever held that a potential, distant harm to a prisoner's health is a serious medical need. . . . Clemmon's complaint regarding [environmental tobacco smoke] is simply of a lesser magnitude than those cases that have found an Eighth Amendment violation. . . .

956 F.2d at 1527. The Tenth Circuit's conclusion – that *latent* harms, including the increased risk of future cancer due to long-term exposure to passive smoke, do not satisfy the objective component of a Cruel and Unusual Punishment claim – directly contradicts the Ninth Circuit's ruling that such risks (to the extent those risks are "unreasonable") do satisfy the objective component. On

this front, and as is relevant here, *Clemmons* cannot be distinguished from the Ninth Circuit's ruling as to the "objective component" of an Eighth Amendment claim.

Second, the *Clemmons* court adopted an interpretation of the "deliberate indifference" standard, the required subjective component of a "conditions of confinement" Eighth Amendment claim, *see Wilson v. Seiter*, 111 S. Ct. 2321 (1991), that also conflicts with the latest *McKinney* order. The Tenth Circuit in *Clemmons* essentially applied a "deliberate indifference" standard that required the inmate to show that the prison officials deliberately or purposely exposed the inmate to dangerous levels of secondhand smoke.

> . . . If plaintiff had shown or even alleged that defendants forced him to live with others who smoked and that they did so *intentionally*, knowing the smoke would have serious medical consequences for him, a different result might obtain.
>
> . . . Clemmons was required to present facts that would allow a reasonable fact finder to conclude that the defendants knew of the dangers of ETS and deliberately exposed him to it.

956 F.2d at 1528. Given the wholesale absence of any allegation or evidence presented by McKinney that the Nevada prison officials deliberately and purposely exposed him to dangerous levels of passive smoke, the *Clemmons* court would have flatly rejected McKinney's claims. But the Ninth Circuit in *McKinney*, on remand from this Court, refused to conclude that the subjective component of a Cruel and Unusual Punishment claim was not satisfied, and instead remanded to the district

court for consideration of "whether the prison officials showed deliberate indifference to McKinney's long term exposure to ETS."

The Ninth Circuit's broad remand order indeed does conflict with *Clemmons*, suggesting that, contrary to the test adopted by the Tenth Circuit, "deliberate indifference" can be established if the inmate merely proves that the defendants merely knew about the inmates exposure and the potential health hazards, but did nothing to stop it.

In sum, the Tenth Circuit in *Clemmons* poses two direct conflicts with the Ninth Circuit's *McKinney* decision in both critical components of Eighth Amendment jurisprudence.

The Ninth Circuit's ruling in *McKinney* also flatly contradicts a decision issued recently by the United States Court of Appeals for the Seventh Circuit in *Steading v. Thompson*, 941 F.2d 498 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992). Judge Easterbrook, writing for a unanimous court, rejected a prisoner's claim that his forced exposure to secondhand tobacco smoke in prison violates the Cruel and Unusual Punishment Clause because the plaintiff had failed to establish that the prison officials intended the passive smoke as punishment to him. Because McKinney brought forth no evidence to suggest that the Nevada prison officials intended his exposure to secondhand smoke, along with its potentially deleterious health effects, as punishment, the Seventh Circuit, in light of its ruling in *Steading*, would clearly have outright rejected McKinney's claim in the case at bar.

Other courts of appeals have also reached decisions that conflict, in varying degrees, with the ruling below. In *Wilson v. Lynaugh*, 878 F.2d 846 (5th Cir.), *cert. denied*, 493 U.S. 969 (1989), the Fifth Circuit Court of Appeals rejected a prisoner's claim that forced passive exposure to cigarette smoke in prison was cruel and unusual punishment. Although relying primarily on res judicata principles (plaintiff having already lost an earlier similar claim), the Court concluded that "evolving standards of decency that mark the progress of a maturing society," *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981), had not yet reached the point of condemning forced exposure to secondhand smoke. 878 F.2d at 851. Moreover, the Ninth Circuit held that an Eighth Amendment violation could be established without even inquiring into evolving standards of decency. *McKinney*, 924 F.2d at 1507.

The United States Court of Appeals for the District of Columbia Circuit also affirmed, without opinion, the District Court decision in *Caldwell v. Quinlan*, 729 F. Supp. 4 (D.D.C.), *aff'd.*, 923 F.2d 200 (D.C. Cir. 1990), *cert. denied*, 112 S. Ct. 295 (1991), rejecting an inmate's claim of cruel and unusual punishment based upon his forced exposure to secondhand smoke in prison. The District Court reasoned that "standards of decency" had not yet evolved to the point of forbidding forced prisoner exposure to passive smoke. 729 F. Supp. at 6-7.

There is also substantial federal district court precedent rejecting the position taken by the Ninth Circuit below. *See, e.g., Gorman v. Moody*, 710 F. Supp. 1256 (N.D. Ind. 1989) (rejecting prisoner's claim that his forced exposure to secondhand smoke is cruel and unusual punishment). While not in itself sufficient to counsel certiorari,

this precedent indicates that, at the very least, there is substantial dispute among the lower courts on the issue presented here. When combined with the inter-circuit conflicts that presently exist, this added conflicting precedent counsels review.

This Court, therefore, should grant the petition for certiorari for the additional purpose of resolving the conflicts among the different federal circuits, both as to whether forced inmate exposure to secondhand smoke satisfies the objective component of an Eighth Amendment violation, and as to the proper interpretation of the "deliberate indifference" standard as applied to exposure health risks.

III. The Ruling Below Violates the Express Holding of this Court's Recent Decision in *Wilson v. Seiter* because Plaintiff Plainly Failed to Establish "Deliberate Indifference," even under the Most Lenient Interpretation of that Requirement.

The Ninth Circuit, instead of holding outright that the deliberate indifference standard was not met, improperly remanded for consideration of that issue. This Court should reverse the Ninth Circuit's ruling because the Plaintiff's *proffer* clearly failed to establish the requisite "deliberate indifference," *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), even under the most lenient view of that standard which would only require a showing that the defendants knew about the inmate's exposure and its serious health hazards, but did not stop it.

Although there was evidence that the prison officials were made aware of McKinney's complaints about exposure to passive smoke and did not take any steps that succeeded in reducing McKinney's exposure, there was no evidence proffered that the prison officials knew or should have known that secondhand smoke poses a serious health hazard. Indeed, whether passive smoking is a serious health threat is to this day a hotly debated subject. Although the Surgeon General's Report of 1986 does suggest that exposure to secondhand smoke creates such a danger, there was no evidence presented that the Nevada prison officials were even aware of that report, or had reason to believe that Report's conclusions as opposed to the findings of other studies disputing the harm caused by passive smoke.

Without evidence of knowledge by Nevada officials of the hazards of secondhand smoke, it simply cannot be said that those officials were deliberately indifferent to McKinney's health. Nevada officials, by not taking steps to reduce or eliminate McKinney's exposure to passive smoke, were at best deliberately indifferent to his desire to be free of passive smoke *exposure*, which, absent any knowledge on their part that such exposure is dangerous to his health, does not constitute deliberate indifference to his *health*.

Therefore, given plaintiff's complete evidentiary failure to satisfy *Seiter*'s express requirement of a showing of "deliberate indifference," even under the most lenient interpretation of that standard, this Court should grant certiorari, and reverse the judgment below, to the extent it allowed plaintiff to proceed on his Eighth Amendment claim.

IV. The Mere Possibility that Forced Exposure to Levels of Secondhand Smoke Will Lead to Cancer or other Disease at some Unspecified Time in the Future Does Not Satisfy the Objective Component of a Cruel and Unusual Punishment Claim.

Even assuming that the Nevada prison officials harbored "deliberate indifference" to McKinney's health, McKinney's claim does not satisfy the "objective component" of an Eighth Amendment violation. *See Hudson v. McMillian*, 112 S. Ct. 995 (1992). Because the judgment below, on this front, independently expands the Eighth Amendment beyond the scope of this Court's precedents, review should be granted.

Needless to say, there are many environmental factors which produce latent risks of injury, yet this Court has never held that the Eighth Amendment requires these factors to be eliminated or reduced in the absence of any present injury to the particular inmate. None of the evidence which Respondent even sought to have admitted below, even viewed in his favor, proved, to a medical certainty, that he would be injured in any particular way from exposure to ETS. As such, the record below, however construed, makes this case no different than the case where a prisoner might complain that the prison diet was too rich in cholesterol, that the prison exercise program leads to too much exposure to ultra-violet radiation, or that prison life subjects him to severe depressive effects (flowing from the loss of companionship, contact with family, and other factors), and thus threatens to inflict latent risks of disease or death.

Whatever else the Eighth Amendment might proscribe, it does not reach these mere risk-enhancing environmental factors. Prisoners who are involuntarily exposed to passive smoke, in this regard, suffer "no adverse physical symptoms . . . different from those suffered by everyone in society." *Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992) (en banc). As the Seventh Circuit agreed, "debate persists about how severe the effects of secondary smoke may be." *Steading v. Thompson*, 941 F.2d 498 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992). This fact, standing alone, negates any Eighth Amendment claim, for the Cruel and Unusual Punishments Clause responds to conditions that are indisputably "cruel and unusual under contemporary standards." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Nevada, of course, may well be obligated to treat prisoners who develop illnesses which result from secondary smoke inhalation, just as it must treat heart disease, stroke, arthritis, cancer, or a number of other illnesses that may be triggered by prison life. But Nevada is not obligated to eliminate risks – such as exposure to secondary smoke – which, while undoubtedly unpleasant, and, even, perhaps "harsh," *id.*, do not violate contemporary standards defining punishment that is cruel. For this reason, as well, review should be granted.

V. The Ninth Circuit's Holding that Nevada's Anti-Smoking Statute Creates a Liberty Interest Protected by the Due Process Clause is Dependent Upon the Doubtful Proposition that Substantive Due Process Rights Can be Derived from State Law.

The Ninth Circuit, in addition to its Eighth Amendment ruling, held that the Nevada anti-smoking statute,

limiting smoking in certain specific public places, applied to prison libraries and therefore created a liberty interest in smoke-free prison libraries that is protected by the Due Process Clause. However, this Court has refused to recognize *substantive* due process protection for interests created by state law. In *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985), this Court assumed, *without deciding*, that a particular substantive due process right, allegedly arising out of state law, existed, and instead rejected the claim on its merits. Most significantly, however, Justice Powell, in his concurring opinion, concluded that:

> While property interests are protected by *procedural* due process even though the interest is derived from state law rather than the Constitution, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), *substantive* due process rights are created only by the Constitution.

Ewing, 474 U.S. at 229 (Powell, J., concurring). This position was not refuted by the majority opinion.

Therefore, because the Ninth Circuit's Due Process holding depends upon the dubious proposition, in light of *Ewing*, that State law can create liberty interests protected by substantive due process, this Court should grant certiorari to reject such an unwarranted expansion of substantive due process that threatens to turn the Constitution into a "font of tort law." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

CONCLUSION

For the foregoing reasons, the amici States respectfully request that this Court grant the writ of certiorari filed by the Attorney General of Nevada, and reverse the judgment below to the extent it allowed plaintiff to proceed on his Eighth Amendment and Due Process claims.

Dated: Honolulu, Hawaii, June 17, 1992.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 27 1992
OFFICE OF THE CLERK

No. 91-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,

Petitioners,

v.

WILLIAM McKINNEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 3, 1992
CERTIORARI GRANTED JUNE 29, 1992

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WILLIAM McKINNEY #13355
NEVADA STATE PRISON
POST OFFICE BOX 607
CARSON CITY, NEVADA 89701

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM McKINNEY, (Full Name) Plaintiff, vs. PAT ANDERSON, CAROL PLOYER, H.L. WHITLEY, GEORGE SUMNER, JOHN NYE, DISTRIBUTORS AND OWNERS OF C.M. PRODUCTS INC., BROWN & WILLIAMSON TOBACCO CORPORATION, R.J. REYNOLDS TOBACCO CO. Defendants.	Case No. CV-N-87-36-ECR (To be supplied by the Clerk) CIVIL RIGHTS COMPLAINT PURSUANT TO 42 U.S.C.§1983 JURY TRIAL DEMAND (Filed January 28, 1987)

A. JURISDICTION

1) WILLIAM McKINNEY, is a citizen of Nevada who presently resides at P.O. Box 607 N.S.P. CARSON CITY, NEVADA 89701 NEVADA STATE PRISON.

2) Defendant H.L. WHITLEY is a citizen of CARSON CITY, NEVADA 89701 POST OFFICE BOX 607 N.S.P. and is employed as WARDEN. At the time the claim(s)

alleged in this complaint arose, was this defendant acting under color of state law? Yes **XXX** No ___ If your answer is "Yes", briefly explain: HE IS CHARGED WITH THE IMMEDIATE CONTROL OF THE MAXIMUM SECURITY PRISON AND THE WELFARE OF ALL PRISONERS CONFINE (SIC) THEREIN.

3) Defendant GEORGE W. SUMNER is a citizen of CARSON CITY, NEVADA P.O. BOX 607 N.S.P., and is employed as DIRECTOR OF PRISON. At the time the claim(s) alleged in this complaint arose was this defendant acting under color of state law? Yes **XXX** No ___ If you answer is "Yes", briefly explain: HE IS CHARGED UNDER NEVADA STATUTES N.R.S. 209;4.09 et seq., WITH RESPONSIBLITY (SIC) TO SUPERVISE AND MANAGE THE PENAL, REFORM AND CORRECTIONAL INSTITUTION OF NEVADA; AND TO

ENFORCE ALL RULES AND REGULATIONS OF PRISON THEREIN.

(Use the back of this page to furnish the above information for additional defendants.) **SEE BACK OF PAGE**

[Back Page] DEFENDANT PAT ANDERSON IS A CITIZEN OF NEVADA AND HIS BUSINESS ADDRESS IS N.S.P. P.O.BOX 607 CARSON CITY, NEVADA 89701 SHE IS EMPLOYED AS ASSOCIATE WARDEN. AT THE TIME THE CLAIMS IN THIS COMPLAINT AROSE SHE WAS ACTING UNDER COLOR OF STATE LAW.

DEFENDANT CAROL PLOYER IS A CITIZEN OF NEVADA AND HER BUSINESS ADDRESS IS N.S.P. P.O. BOX 607 CARSON CITY, NEVADA 89701. SHE IS EMPLOYED AS A UNIT COUNSELOR AT THE PRISON. AT THE TIME THE CLAIMS IN THIS COMPLAINT AROSE. SHE WAS ACTING UNDER STATE LAW.

DEFENDANT R.J. REYNOLDS TOBACCO COMPANY IS A CITIZEN OF WINSTON-SALEM, N.C. 27102, U.S.A. AND HE IS UNDER BUSINESS

CONTRACT WITH DEFENDANT PRISON OFFICIALS. AT THE TIME THE CLAIMS IN THIS COMPLAINT AROSE, HE WAS ACTING UNDER COLOR OF STATE LAW: HE HAS A BUSINESS CONTRACT WITH DEFENDANT-PRISON OFFICIALS.

DEFENDANT JOHN NYE IS A CITIZEN OF NEVADA. HIS BUSINESS ADDRESS IS N.S.P. P.O. BOX 607 CARSON CITY, NEVADA 89701. HE IS EMPLOYED AT THE NEVADA STATE PRISON AS A STORE MANAGER. AT THE TIME THE CLAIMS IN THIS COMPLAINT AROSE HE WAS ACTING UNDER COLOR OF STATE LAW.

DEFENDANT C.M. PRODUCTS INC., IS A CITIZEN OF CALIFORNIA. HIS BUSINESS ADDRESS IS P.O. BOX 15436 SACRAMENTO, CALIFORNIA 95813 U.S.A. HE IS A DISTRIBUTOR OF CERTAIN TOBACCO PRODUCTS. AT THE TIME THE CLAIMS ALLEGED IN THIS COMPLAINT AROSE, THIS DEFENDANT WAS ACTING UNDER COLOR OF STATE LAW: HE HAS A BUSINESS CONTRACT WITH DEFENDANT PRISON OFFICIALS.

DEFENDANT BROWN & WILLIAMSON IS A CITIZEN OF LOUISVILLE, KY. 40232 U.S.A. AT THE TIME THE COMPLAINT AROSE THIS DEFENDANT WAS ACTING UNDER COLOR OF STATE LAW: HE HAS A BUSINESS CONTRACT WITH DEFENDANTS-PRISON OFFICIALS.

4) Jurisdiction is invoked pursuant to 28 U.S.A. §1343(a)(3) and 42 U.S.C. §1983. (If you wish to assert jurisdiction under different or additional statutes, you may list them below.) PLAINTIFF ALSO INVOKES THE PENDENT JURISDICTION OF THIS COURT; 42 U.S.C. 1981; 42 U.S.C. 1985 (3); 42 U.S.C. 1985; AND THE FIRST AND EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, AND F.R.C.P. RULE 65. 42 U.S.C.20009-2; 46 F.P.D.2d-11-720 (sic).

B. NATURE OF THE CASE

1) Briefly state the background of your case.

ON OR ABOUT MAY 18, 1986, I MADE REQUEST TO BE MOVED INTO ROOM 93 IN (H) WING AT THE NEVADA STATE PRISON. I REQUESTED TO MOVE BECAUSE MY ROOMATE (SIC) IS A HEAVY SMOKER. ON OR ABOUT MAY 23, 1986, THE UNIT COUNSEL, (SIC) BURNS SENT WORD BY THE UNIT OFFICER THAT I WOULD BE MOVED. I WROTE WARDEN H.L. WHITLEY AND EXPLAINED MY PROBLEMS TO HIM AND REQUESTED THAT I BE MOVED FOR RESON (SIC) THAT MY ROOMATE (SIC) SMOKED FIVE PACKS OF CIGARETTES A DAY. I'VE BEEN ASSIGNED TO AND LIVING IN ROOM #86 IN (H) WING SINCE MARCH 1986. I HAVE MADE REQUEST FOR A SINGLE ROOM, I'VE REQUESTED TO BE MOVED IN WITH A NON-SMOKER. I'VE SUFFER (SIC) FROM THE SMOKE, AND I'VE REQUESTED MEDICAL ATTENTION, GEORGE W. SUMNER, DIRECTOR OF PRISONS APPROVED OF JOHN NYE SELLING TOBACCO AND CIGARETTES TO INMATES WITHOUT ADEQUATE WARNING

LABELS ON THEM JOHN NYE SELLS THESE ITEMS TO INMATES. THE PRISON STAFF ALLOWS INMATES TO SMOKE CIGARETTES ANYWHERE EXCEPT THE DINING ROOM. THE OWNERS AND DISTRIBUTORS OF C.M. PRODUCTS INC., SELLS BEST BUY CIGARETTES TO PRISON INMATES WITHOUT PROPERLY INFORMING OF THE HEALTH HAZARDS AN INMATE THAT DOSEN'T (SIC) SMOKE COULD ENCOUNTER BY SHARING A ROOM WITH AN INMATE WHO SMOKE (SIC). PLAINTIFFS' (SIC) ROOMATE (SIC) BUYS THE CHEAPER BEST BUY CIGARETTE ONCE A WEEK. OTHER INMATES SMOKE THE SAME BRAND OF CIGARETTES DAILY WHILE IN CLOSED CONFINES WITH THE PLAINTIFF. CIGARETTE SMOKING IS ALLOWED IN THE CLASS ROOMS AND THE LAW LIBRARY AT THE NEVADA STATE PRISON.

BROWN & WILLIAMSON TOBACCO CORPORATION SELLS BUGLAR CIGARETTE TOBACCO TO THE PRISON INMATES' CANTEEN WITHOUT PRO-

VIDING WARNINGS ON THE PRODUCTS TO ALERT THE NON-SMOKER OF THE HEALTH HAZARDS HE WILL ENCOUNTER BY BEING HOUSED WITH INMATES WHO SMOKE.

PLAINTIFF ROOMATE, (SIC) LAWRENCE GREEN, BUYS AND SMOKES BUGLAR AND SO DO OTHER INMATES IN (H) WING.

AT THE NEVADA STATE PRISON BLACK AND WHITE INMATES ARE HOUSED ON AN EQUAL BASIS: ON OR ABOUT MAY 18, 1986, THERE WAS A ROOM OPEN (VACANT) IN (H) WING IN UNIT #2 FOR A BLACK INMATE, BUT PRISON OFFICIALS, KNOWING OF PLAINTIFFS' (SIC) REQUEST TO MOVE INTO THE PARTICULAR ROOM, MOVES A WHITE INMATE INTO THE ROOM FORCING PLAINTIFF TO STAY IN THE ROOM WITH A HEAVY SMOKER. ALL OF MY ROOMATES (SIC) HAVE BEEN HEAVY SMOKERS. PLAINTIFF IS PRESENTLY HOUSED IN THE ROOM WITH ANOTHER HEAVY SMOKER AND HAS MADE NUMEROUS REQUEST (SIC) TO MOVE. PRISON

OFFICIALS DO NOT SCREEN INMATES FOR PERSONAL HABITS THAT MAY BE DETREMENTAL (SIC) TO PLAINTIFFS' (SIC) HEALTH BEFORE HOUSING THEM TOGETHER.

THAT R.J. REYNOLDS TOBACCO COMPANY SELLS (CAMEL CIGARETTES) TO PRISON OFFICIALS WHO IN TURN SELLS THEM TO PRISONERS. NONE OF THE TOBACCO PRODUCTS SOLD TO PRISONERS PROVIDE THE PROPER INGREDIENTS INFORMATION.

THAT CAMEL CIGARETTES ONCE LIT WILL BURN CONTINUOUSLY RELEASING SOME TYPE OF CHEMICAL.

THAT R.J. REYNOLDS TOBACCO COMPANY HAS A BUSINESS CONTRACT WITH DEFENDANT PRISON OFFICIALS.

DEFENDANT PRISON OFFICIALS HAVE DONE NOTHING TO SEPARATE THE NON-SMOKING INMATES FROM THE SMOKERS.

THE NEVADA STATE PRISON IS OVER CROWDED.

THERE ARE NINETY SIX (96) INMATES IN EACH UNIT IN THE PRISON'S GENERAL POPULATION AND APPROXIMATELY SIXTY SIX (66%) OF THOSE SMOKE CIGARETTES.

C. CAUSE OF ACTION

1) I allege that the following of my constitutional rights, privileges or immunities have been violated and that the following facts form the basis for my allegations: [If necessary you may attach up to two additional pages (8½" x 11") to explain any allegation or to list additional supporting facts.]

a)(1) County I: HEALTH DAMAGES BY CIGARETTE SMOKE

(2) Supporting Facts: (Include all facts you consider important, including names of persons involved, places and dates. Describe exactly how each defendant is involved. State the facts clearly in your own words without citing legal authority or argument.)

MY NOSE BLEED (SIC) AND RUN MUCUS CONSTANTLY; EXSPECIALLY (SIC) WHEN I HAVE TO ENHALE (SIC) CIGARETTE SMOKE. THE ROOM IS VERY SMALL AND THE LIVING QUARTERS AND THE LAW LIBRARY IS NOT EQUIPED (SIC) WITH AIR CONDITION. I HAVE HEADACHES OFTEN. AND I DON'T HAVE ENERGY TO EXERCISE.

b)(1) Count II: SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT

(2) Supporting Facts:

THE DEFENDANT DISTRIBUTORS' CIGARETTE PRODUCTS DO NOT SHOW WHAT CHEMICALS ARE USED TO CURE AND PACKAGE THEIR CIGARETTES AND TOBACCO. I'M SHORT OF BREATH AND I HAVE CHEST PAINS THAT STARTED IN MARCH 1986.

c)(1) Count III: DENIED EQUAL PROTECTION OF LAW

(2) Supporting Facts:

C.M. PRODUCTS INC., PROVIDED AN INADEQUATE WARNING ON THEIR (BEST BUY)

CIGARETTES; THE WARNING PERTAINS ONLY TO PREGNANT WOMEN. LABELS CONTAINS (SIC) NO INFORMATION AS TO THE INGREDIENTS OF THE CIGARETTES.

D. PREVIOUS LAWSUITS AND ADMINISTRATIVE RELIEF

1) Have you begun other lawsuits in state or federal courts dealing with the same facts involved in this action or otherwise relating to the conditions of your imprisonment? Yes XXX No ___ If your answer is "Yes", describe each lawsuit. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

a) Parties to previous lawsuit:
   Plaintiffs: WILLIAM McKINNEY
   Defendants: WILLIAM LATTIN, et al.

b) Name of court and docket number:
   U.S. DISTRICT COURT DISTRICT OF NEVADA CV-S-85-314;R.D.F.;

c) Disposition: (For example: Was the case dismissed? Was it appealed? Is it still pending?) THE CASE IS STILL PENDING

d) Issues raised: SUBJECTED TO RACIAL DISCRIMINATION,CRUEL AND UNUSUAL PUNISHMENT AND DENIAL OF DUE PROCESS.

e) Approximate date of filing lawsuit: 2/16/1985

f) Approximate date of disposition: N/A

2) I have previously sought informal or formal relief from the appropriate administrative officials regarding the acts complained of in Part C. Yes XXX No ___ If your answer is "Yes", briefly describe how relief was sought and the results. If your answer is "No", briefly explain why administrative relief was not sought.

I'VE MADE NUMEROUS REQUEST TO MOVE IN WITH A NON-SMOKER. MY LAST REQUAST (SIC) WAS MADE TO PRISON OFFICIALS ON OR ABOUT 12-10-86 BUT I'VE RECEIVED NO RESPONSE.

E. REQUEST FOR RELIEF

1) I believe that I am entitled to the following relief:

THAT THIS COURT ISSUE A PRELIMINARY INJUNCTION AGAINST DEFENDANT PRISON OFFICIALS PROHIBITING THEM FROM HOUSING HIM WITH INMATES WHO SMOKE. THAT EACH DEFENDANT BE SUED IN HIS OFFICIAL, PERSONAL AND INDIVIDUAL CAPACITY; THAT EACH DEFENDANT PAY PLAINTIFF $1,000,000.00 IN PUNITIVE DAMAGES; THAT EACH DEFENDANT PAY PLAINTIFF $100,000.00 FOR SUBJECTING HIM TO CRUEL AND UNUSUAL PUNISHMENT; THAT EACH DEFENDANT PAY PLAINTIFF $5,000,000.00 FOR JEOPADIZING (SIC) HIS HEALTH; THAT EACH DEFENDANT PAY

PLAINTIFF ATTORNEY FEES AND COURT COST.

IN PRO PER
Signature of Attorney (if any)

N/A

(Attorney's full address and telephone number)

(illegible)
Signature of Plaintiff

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the plaintiff in the above action, that he has read the above complaint and that the information contained therein is true and correct. 28 U.S.C. §1746. 18 U.S.C. §1621.

Executed at CARSON CITY, NEVADA 89701
(Location)
on DECEMBER 18, 1986.
(Date)

(illegible)
(Signature)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
(Caption omitted in printing)

ANSWER TO CIVIL RIGHTS COMPLAINT

Case No. CV-N-87-36-ECR

(Filed March 13, 1987)

Defendants Anderson, Ployhar, Whitley, Sumner and Nye, by and through their counsel, BRIAN McKAY, Attorney General of the State of Nevada, hereby answer the civil rights complaint of Plaintiff William McKinney as follows:

A. JURISDICTION

1) Admitted.

2) Defendant Harol Whitley admits that he is the Warden of the Nevada State Prison and that his business address is P.O. Box 607, Carson City, Nevada, 89702.

3) Defendant George Sumner admits that he is the Director of the Nevada Department of Prison and that his business address if P. O. Box 7011, Carson City, Nevada, 89702.

3)(a) Admitted.

3)(b) Admitted.

3)(c) Not Applicable.

3)(d) Admitted.

3)(e) Not Applicable.

3)(f) Not Applicable.

4) Defendants admit that the jurisdiction alleged by plaintiff would be proper if his complaint had merit.

B. NATURE OF THE CASE

Defendants admit that plaintiff has, at various times, requested relief from being celled with inmates who are smokers. Defendants deny that they have done nothing to separate the nonsmoking inmates from the smokers, and allege that they have made efforts to do so, to the greatest extent possible. Defendants further admit that a majority of the inmate at Nevada State Prison are smokers. Defendants are without sufficient knowledge or belief as to the

remaining allegations contained in the Nature of The Case and therefore deny those allegations.

C. CAUSE OF ACTION

1)a)(1) Count I: Denied.

a)(2) Supporting Facts: Denied.

1)b)(1) Count II: Denied.

b)(2) Supporting Facts: Denied.

1)c)(1) Count III: Denied.

c)(2) Supporting Facts: Denied.

D. PREVIOUS LAWSUITS AND ADMINISTRATIVE RELIEF

1) No response necessary.

2) Defendants admit that plaintiff has made requests to be allowed to live with a nonsmoker.

E. REQUEST FOR RELIEF

Defendants deny that plaintiff is entitled to any relief.

. . .

. . .

. . .

AFFIRMATIVE DEFENSES

1) Plaintiff McKinney has failed to state a claim upon which relief can be granted.

2. Plaintiff McKinney is solely responsible for all matters which he alleges by virtue of his own negligent, grossly negligent and/or intentional acts.

3. Defendants are immune from suit in that at all relevant times, defendants have acted in good faith and in accordance with all applicable local, state or federal law.

WHEREFORE, defendants request that plaintiff take nothing by virtue of his complaint and that the complaint be dismissed with prejudice and that defendants be granted their costs of suit and such

. . .

. . .

. . .

other and further relief as the court deems appropriate in the premises.

DATED this 13th day of March, 1987.

BRIAN McKAY
Attorney General

By: /s/ John H. Cary
John H. Cary
Deputy Attorney General
Criminal Justice Division

(Certificate of Service omitted in printing).

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
(Caption omitted in printing)

AFFIDAVIT OF DON HELLING

Case No. CV-N-87-36-ECR

(Filed June 19, 1987, as Exhibit A to Opposition to Motion for Preliminary Injunction)

STATE OF NEVADA)
)
Carson City)

I, DON HELLING, being first duly sworn, hereby depose and state that:

1. I am the Chief Classification Counselor and, until recently, the Acting Associate Warden for Prog. at Nevada State Prison, and I make this affidavit in support of defendants' Opposition to Plaintiff's Motion for Preliminary Injunction.

2. Classification decisions at Nevada State Prison are based upon many factors, and both the needs of the institution and the needs of the inmate are taken into

account. Institutional security is, of course, the most important consideration.

3. In classifying an inmate, the inmate's institutional history and criminal history are both relevant. In the broadest sense, inmates are first classified to a particular housing category such as general populations, protective custody, administrative segregation and disciplinary segregation.

4. Once an inmate has been classified into one of these categories, he is then assigned to a particular unit, wing and cell. Among the factors considered in making this decision are possible enemy situations, the age of the inmate, friendships and ethnic balance within particular housing wings. The personal desires of the inmate are also taken into account insofar as practical.

5. In his motion for preliminary injunction, McKinney has asked for an order

prohibiting the classification committee from housing him in any wing of any unit which houses inmates who smoke. Such an order would place an undue burden upon the classification process, as it would severely limit the prison's housing options with regard to the inmate. It might make it more difficult or even impossible to place McKinney in a segregation unit, should his actions justify such a move, as such a unit might already contain inmates who smoke.

6. Based upon my experience, I would estimate that two-thirds of the inmate at NSP smoke or use other tobacco products. Smoking is very important to many inmates, and I believe that if smoking were banned at NSP it would create a potentially dangerous situation due to the anger of those inmates who do smoke,

. . .

and constitute a threat to the security of the institution.

DATED this 18 day of June, 1987.

(illegible)
DON HELLING

SUBSCRIBED and SWORN to before me this 18th day of June, 1987.

Joy Brewer
NOTARY PUBLIC

(Notary seal omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
(Caption omitted in printing)

MAGISTRATE'S REPORT AND RECOMMENDATION

Case No. CV-N-87-36-ECR

(Filed April 8, 1988)

This report and recommendation is made to the Honorable Edward C. Reed, Jr., United States District Judge. The matter was referred to the Magistrate pursuant to 28 U.S.C. § 636(b)(1)(B). On September 3, 1987 defendants filed a Motion for Summary Judgment (court docket #15A) which plaintiff opposed on September 15, 1987 (court docket #17). No reply was filed. No hearing was requested and none has been had.

In their pleadings both parties rely on matters argued in pleadings filed regarding plaintiff's Motion for Preliminary Injunction and Temporary Restraining order filed in February 3, 1987 (court docket #4). Defendants opposed the motion

on June 19, 1987 (court docket #11) and plaintiff replied on July 6, 1987 (court docket #12). The Motion for Injunctive Relief was ordered consolidated with an advanced trial date set for September 22, 1987 (Order of July 20, 1987 - court docket #13) which was vacated upon defendants' motion pending determination of the Motion for Summary Judge. See Order of September 9, 1987 - court docket #16.

The Complaint

In the complaint filed January 28, 1987, plaintiff, an inmate of the Nevada State prison, alleged that he is assigned a room with another inmate who is a heavy smoker and that all of his roommates have been heavy smokers. he states that he has requested to be moved to a single room or to a room with a nonsmoker on numerous occasions. He estimates that of the 96 inmates in each unit approximately two-thirds smoke cigarettes.

He claims that the prison officials do not screen inmates for personal habits and have done nothing to separate nonsmoking inmates from smokers. He complains that his nose bleeds and runs mucus constantly but especially when he inhales cigarette smoke; that he has frequent headaches, lacks energy to exercise, is short of breath and that he has had chest pains since March, 1986 (when he was moved to his present room). He states that his roommate smokes five packs of cigarettes a day; that their room is very small and not equipped with air conditioning. He also complains that cigarette smoking is allowed in classrooms and at the law library at the Nevada State Prison.

His complaints about the tobacco companies are that they sell cigarettes to the prison (which are then sold to inmates at the canteen) which cigarette

packages do not provide proper ingredient information or a warning to alert the nonsmoker of the health hazards he may encounter by being housed with inmates who smoke. The tobacco company defendants have not been served or entered an appearance. Thus the defendants referred to here are those who are employees or officers of the Nevada Department of Prisons (NDOP) and the issues discusses relate to those defendants.

The answer filed March 13, 1987 (court docket #9) on behalf of Pat Anderson, NSP Associate Warden; Carol Ployhar, NSP counselor; H.L. Whitley, NSP Warden; George Sumner, Director of the NDOP; and John Nye, NSP Store Manager, admitted that plaintiff has requested relief from being housed with inmates who smoke and that a majority of NSP inmates smoke.

In the complaint plaintiff requests money damages, an injunction prohibiting defendants from housing him with inmates who smoke, costs and attorney fees. His Motion for Preliminary Injunction requests that the court prohibit the defendants from moving plaintiff in any wing of any housing unit with inmates allowed to smoke cigarettes.

Motion for Summary Judgment

Legal Standard

In June, 1986 the United States Supreme Court set forth the standards that are to be applied in determining a Motion for Summary Judgment in two decisions.

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986), the court stated that the materiality of the facts in dispute rests on the substantive law of the case and it is the substantive law's identification of which facts are

critical and which facts are irrelevant that governs. Ibid., 2510. There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. The mere existence of a scintilla of evidence in support of the plaintiff's position will not be sufficient; there must be reasonable evidence on which the jury could reasonably find for the plaintiff. Ibid., 2511-2512.

In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986), the court noted that summary judgment is not a disfavored procedural shortcut but an integral part of the federal rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action and that Rule 56

must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury but also for the rights of persons opposing such claims and defenses to demonstrate, in the manner provided by the rule prior to trial, that the claims and defenses have no factual basis. Ibid., 2555. The moving party need not support its motion with affidavits or other materials negating the opponent's claim. Regardless of whether the moving party accompanied its summary judgment motion with affidavit, the motion may and should be granted so long as whatever is before the court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c) is satisfied.

> One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses,

> and we think it should be interpreted in a way that allows it to accomplish this purpose. Ibid., 2553.

It should be remembered, however, that credibility determinations, weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether his ruling is on a motion for summary judgment or for a directed verdict. Evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. Trial courts should act with caution in granting summary judgment and may deny summary judgment where there is reason to believe that the better course would be to proceed to a full trial. Anderson v. Liberty Lobby, Inc., supra. 2513-2514.

Defendants' Argument

In their Motion for Summary Judgment defendants contend: (1) that plaintiff has failed to properly allege the

personal involvement of defendants Anderson and Ployhar; (2) that plaintiff, in the complaint and in the Motion for Preliminary Injunction, has failed to show the existence of a constitutional right to be incarcerated in a smoke-free environment; and (3) that even if such a constitutional right did exist, the non-separation of smokers from nonsmokers is reasonably related to a legitimate penalogical (sic) interest.

In aid of their motion the defendants concede that smoking is allowed in all areas of the prison except the culinary and the infirmary. (Motion, p. 5-6). They rely on the affidavit of Don Helling to describe the classification process and the prison's concerns with what plaintiff requests. See Exhibit "A" to defendants' opposition to the Motion for Preliminary Injunction filed June 19, 1987 - court docket #11.

Helling, who is the Chief Classification Counselor and formerly Acting Associate Warden for Programs at NSP, stated that classification at NSP is based on numerous considerations. The inmate's institutional and criminal histories are used to classify the inmate into a particular housing category such as general population, protective custody, administrative segregation and disciplinary segregation. Once an inmate has been classified into one of these categories he is assigned to a particular unit, wing and cell. Among the factors considered in making this decision are possible enemy situations, the age of the inmate, friendships, ethnic balance within a particular housing unit, and so far as possible the personal desires of the inmate.

Mr. Helling estimates that two-thirds of the prison population at NSP smoke or

use other tobacco products. He further states that smoking is very important to many inmates and were smoking banned at NSP it would create a potentially dangerous situation due to anger of those inmates who do smoke and would constitute a threat to the security of the institution.

He states that an order prohibiting the classification committee from housing the plaintiff in any wing which houses inmates who smoke would place an undue burden upon the classification process as it would severely limit the prison's housing options regarding the inmate and would make it difficult or impossible to place plaintiff in a segregated unit should his actions justify such a move.

Plaintiff's Opposition

Plaintiff argues that the prison officials named are all in some way personally knowledgeable or responsible

for the situation. He states that Pat Anderson is aware that inmates smoke cigarettes in the law library; that the building does not have windows capable of being opened and that there is inadequate ventilation in the building. (He states that he has nine legal actions pending and must use the law library on a daily basis.) He states that Carol Ployhar sits on the prison's disciplinary committee and is aware of a provision in the Code of Penal Discipline which prohibits inmates from (sic) in unauthorized areas and that she realized this rule discriminates against nonsmokers because it does not protect them in housing units and the prison's law library. He states she is responsible for screening inmates for personal habits but does not screen them regarding smoking. He argues that he has a constitutional right to be incarcerated in a smoke-free environment

and that the laws which control cigarette smoking in public places and the food and drug laws must be enforced in every segment of society, including prisons, under the Nevada Constitution, Article 1, Section 1.

Discussion

The factual situation regarding a number of issues in (sic) uncontested. Approximately two-thirds of the inmates of NSP smoke cigarettes or use other tobacco products. Smoking is allowed in all areas of the prison except for the culinary and the infirmary. Whether or not an inmate smokes is not considered a significant factor, if considered at all, in determining the cell and cellmate an inmate is assigned. Plaintiff has requested that he be assigned a nonsmoking cellmate or other housing arrangements but his request has not been granted.

The defendants take the position that prohibiting smoking would cause significant anger and security problems among many inmates who do smoke and that requiring the assignment of nonsmoking inmates to smoke-free areas would greatly burden the classification process and would make certain disciplinary segregation assignments extremely difficult if not impossible.

For the purpose of this motion the defendants have not addressed plaintiff's health situation, i.e. his complaints about how tobacco smoke affects him. Correspondingly, plaintiff has not substantiated his physical problems with a physician's evaluation, etc. (Nor was he required to do so given the basis of the defendants' motion.) Likewise plaintiff has not challenged the defendants' claim that there exists a legitimate penological interest in not

accommodating a preference for a smoking or nonsmoking environment. He simply concluded that it was their job to take care of such problems.

The court has been unable to find any case law specifically holding that a nonsmoking inmate has a constitutional right to a smoke-free environment. However, that does not dispose of the matter. The Eighth Amendment draws its meaning from "the evolving standards of decency that mark the progress of maturing society." The affect of tobacco smoke on nonsmokers, especially those with particular medical needs or allergic reactions, is a growing subject of sensitivity in this society. See for example, 14 A.L.R. 4th 1234, Annotation: "Right to Unemployment Compensation as Affected by Employee's Refusal to Work in Areas Where Smoking is Permitted," and 37 A.L.R. 4th 480, Annotation: "Right of Employee to

Injunction Preventing Employer from Exposing Employee to Tobacco Smoke in Workplace." The court does not mean to suggest that employee standards apply to prisoners, but only that sensitivity to this issue appears to be evolving along with scientific and medical findings in the area.

The accepted manner of analyzing the smoking/nonsmoking situation appears to not be on the basis of whether a per se constitutional right exists but rather on the constitutional grounds of : (1) whether any of the defendants have been deliberately indifferent to plaintiff's serious medical needs under the reasoning of Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285 (1976) and (2) whether the conditions in which the plaintiff has been housed constitute a deliberate indifference of pain and suffering under Rhodes v. Chapman, 452 U.S. 337, 101

S. Ct. 2392 (1981). See Beeson v. Johnson, 668 F.Supp. 498, 501 (E.D. N.C. 1987) which used this approach and discussed the type of issues presented here. The method is consistent with the reasoning in Lee v. Carson, 645 F. Supp. 1430, 1436-8 (S.D. N.R. 1986), affirmed without opinion at 812 F.2d 712 (2nd Cir. 1987) discussed by the parties but providing little comment on the smoking issue; and Franklin v. State of Oregon, 662 F.2d 1337, 1347 (9th Cir. 1981) known as Franklin I , in which a prisoner's complaint that he had been placed in a cell with a heavy smoker of cigarettes caused serious danger to his health because of a throat tumor, was held to raise an arguable claim not wholly insubstantial and subject to sua sponte dismissal.

Plaintiff's allegations of physical symptoms and harm from being in close

quarters with a heavy smoker have been raised in the complaint making them issues of material fact under the substantive law applicable to the case. Consequently, defendants have not satisfied their burden under Fed.R.Civ.P. 56(c) of showing that there remains no genuine issue of material fact to be tried and that they are entitled to judgment as a matter of law. The Motion for Summary Judgment should be denied. The court does note that defendants' contentions regarding defendants Anderson and Ployhar are well taken in that the complaint does not adequately allege their participation and involvement, but it appears that Ployhar as plaintiff's unit counselor and Anderson as Associate Warden were very likely recipients of plaintiff's requests for a move and plaintiff could make his allegations adequate.

Related Matters

As noted above, the trial date was vacated during the pendency of the Motion for Summary Judgment. Plaintiff's motion for subpoena to produce expert witnesses (court docket #14A) and petition for writ of habeas corpus ad testificandum (court docket #14B), both filed August 21, 1987, were left pending because they applied to the combined trial date. These motions are nondispositive pretrial matters under 28 U.S.C. § 636(b)(1)(A) which are being determined in a separate order.

Ordinarily the action should be reset for the combined hearing and trail if the District Court adopts this report and recommendation. However, the legal grounds of this report and recommendation and of the companion ruling on plaintiff's witnesses may suggest to the parties (and especially to plaintiff inasmuch as he has the burden of proof)

that they need further development of the facts before proceeding to present their evidence. Therefore, as a part of their objections or responses, or as a separate statement within the same time period allowed for objections, the parties should inform the District Court whether they are ready to proceed to expedited trial or whether they need additional time. It is pointed out to plaintiff that he would in such a case be in effect waiving his right to an advanced hearing date. The parties should also be aware that the court may require the filing of a joint prehearing (proposed) order.

RECOMMENDATION

For the reasons set forth above, the Magistrate recommends that the District Court issue its order denying defendants'

. . .

. . .

Motion for Summary Judgment filed September 3, 1987 (court docket #15A).

DATED this 8th day of APRIL, 1988.

/s/Phyllis Halsey Atkins
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
(Caption omitted in printing)

O R D E R

Case No. CV-N-87-36-ECR

(Filed May 5, 1988)

The court having reviewed the report and recommendation of the magistrate filed herein April 8, 1988 regarding defendants' Motion for Summary Judgment (court docket #15A) and no objections having been filed thereto,

IT IS HEREBY ORDERED:

1. The magistrate's recommendation is hereby adopted;

2. Defendants' Motion for Summary Judgment (filed September 3, 1987 - court docket #15A) is hereby denied.

DATED this 5 day of MAY, 1988.

/s/Edward C. Reed
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
(Caption omitted in printing)

PROPOSED JOINT PRE-TRIAL ORDER

Case No. CV-N-87-36-ECR

(Filed January 11, 1989)

Following pretrial proceedings in this cause pursuant to Local Rule 190-3,

IT IS ORDERED:

I.

This is an action for injunctive relief and damages which has been brought by William McKinney, an inmate incarcerated at nevada State prison in Carson City, Nevada. The defendants who have been served include George Sumner, the Director of the Nevada Department of Prisons; Harol Whitley, the Warden at Nevada State Prison; Pat Anderson, the former Associate Warden of Programs at Nevada State Prison; Carol Ployhar, a Counselor at Nevada State Prison; and John Nye, formerly in charge of the prison canteen

at Nevada State Prison. Also named as defendants, but not served in this case, are the distributors and owners of C. M. Products; Brown & Williamson Tobacco Company; and R.J. Reynolds Tobacco Company.

McKinney alleges that the defendants have acted to deprive him of his rights under the eighth amendment to the United State Constitution to be free from cruel and unusual punishment. He contends that his health has been damages by the cigarette smoke of other inmates at the prison and claims that he is constitutionally entitled to be housed in a smoke-free environment. He seeks damages in the amount of $6,100,000.00 from each defendant, as well as costs and attorney fees, and requests that the court enter an injunction prohibiting the defendants from housing him in any wing of any unit which also houses smokers.

The defendants allege that McKinney has no such constitutional right, and even if he does, that they have acted in good faith and are therefore immune from liability.

II.

STATEMENT OF JURISDICTION

McKinney has invoked jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983. He also claims jurisdiction under 42 U.S.C. §§ 1981, 1985(3), 1986, and 20009-2. The defendants agree that jurisdiction is proper under 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983.

III.

The following facts are admitted by the parties and require no proof:

1. At all relevant times, plaintiff William McKinney has been an inmate incarcerated at Nevada State Prison in Carson City, Nevada.

2. At all relevant times, defendant George Sumner has been the Director of the Nevada Department of Prisons.

3. AT all relevant times, defendant Harol Whitley has been the Warden at Nevada State Prison.

4. At the time the complaint was filed and until approximately December of 1987, defendant Pat Anderson was the Associate Warden of Programs at Nevada State Prison.

5. At the time of the filing of the complaint and presently, defendant Carol Ployhar was and is a counselor at Nevada State Prison.

6. At the time of the filing of the complaint, defendant John Nye supervised the operation of the prison canteen.

7. Approximately two-thirds of the inmates at Nevada State Prison are cigarette smokers or use other tobacco products.

8. There are no restrictions on smoking in the prison's housing units, classrooms or law library. Inmates are not permitted to smoke in the infirmary or culinary.

IV.

The following facts, though not admitted, will not be contested at trial by evidence to the contrary:

None.

V.

The following are the issues of fact to be tried and determined upon trial:

1. What requests, if any, has McKinney made of the defendants with regard to being housed with non-smokers?

2. What actions, if any, have the defendants taken to accommodate McKinney's wishes?

3. To what degree is McKinney exposed to cigarette smoke?

4. Has McKinney's health been injured by exposure to cigarette smoke, and, if so, to what extent?

5. Does McKinney have any medical condition which makes him particularly susceptible to ill health as a result of exposure to cigarette smoke?

6. What personal involvement, if any, has each of the defendants had in the matters alleged by McKinney?

7. How would a ban on smoking effect the operation of Nevada State Prison?

VI.

The following are the issues of law to be tried and determined upon trial:

1. Have the defendants been deliberately indifferent to the serious medical needs of McKinney, and have they therefore violated his right to be free from cruel and unusual punishment?

2. Does McKinney have a constitutional right to be housed in a smoke-free environment?

3. What damages, if any, has McKinney suffered?

4. Is an award of punitive damages appropriate in this case?

5. Is McKinney entitled to injunctive relief prohibiting the defendants from housing him in any wing of any unit which also houses smokers?

6. Are the defendants entitled to good faith immunity? *Plaintiff objects to No. 6. Signed William McKinney, #13355.*

VII.

A. The following exhibits are admissible in evidence in this case and may be marked in evidence by the clerk:

1. Plaintiff's Exhibits:

a. Administrative DOP 3044 form filed on May 19, 1986

b. Kites in reply from Carol Ployhar dated October 15, 1986 and February 4, 1987

c. Kites addresses to Roger Jacobs dated July 28, 1987

d. Kite addressed to doctor of NSP dated August 16, 1987

e. Medical prescription label from Doctor Harrison dated August 25, 1987

f. Kite to Doctor Harrison of NSP medical department dated April 18, 1988

g. Kite to Doctor Harrison dated April 24, 1988

h. Administrative DOP 3044 form filed on June 21, 1988, addressed to Carol Ployhar

i. Administrative DOP 3044 form filed on August 4,m

1988, addressed to George W. Sumner

j. Administrative DOP 3044 form filed on July 15, 1987, addressed to Pat Anderson

k. Second set of interrogatories to Las Vegas, Nevada, attorney Joan Buckley, dated August 17, 1987

l. Defendants' answer to plaintiff's first set of interrogatories served to plaintiff on the 25th day of March, 1987

m. Kite to Pat Nixon, Unit Counselor, dated June 22, 1988, with attached Administrative DOP form file dated June 19, 1988

n. Four kites addressed to unit counselor Stephanie

Nixon, dated August 3, 1988, August 5, 1988, August 11, 1988, and August 24, 1988

o. Kites addressed to Doctor Harrison dated May 5, 1988

p. Cigarette pack labels from R. J. Reynolds Tobacco Corp. from 1987

q. Cigarette pack labels from Brown & Williamson Tobacco Corp. from 1986

r. An NSP inmate store voucher, item ticket, and store list dated May 24, 1986, from one of my roomates (sic), Lawrence Green, #14996

s. A pamphlet entitled "A Pathologist's View of the Effects of Smoking on the

Human Body" by C. L. Dale, M.D., Pathologist

t. A pamphlet written by a dentist on cigarette smoking, Arden G. Christen, D.D.S., M.S.D.

u. A letter from Stephanie E. Hunter, Northern Area Director of the American Cancer Society, and five pamphlets from the American Cancer Society on sidestream (sic) cigarette smoke and its effect upon the nonsmoker.

v. An article from the Muscle and Fitness magazine of March, 1988, Volume 49, No.3, by Armand Tanny

w. Tobacco information sheet from Newton, MA, Education Development Center, Inc.

2. Defendant's Exhibits:

a. Institutional records regarding William McKinney.

b. McKinney's prison medical records.

c. Records relating to the operation of the Nevada State Prison canteen.

B. As to the following exhibits the parties have reached the stipulations stated regarding the same:

1. Plaintiff's Exhibits:

None.

2. Defendant's Exhibits:

None.

C. As to the following exhibits, the party against whom the same will be offered objects to their admission upon the grounds stated:

1. Plaintiff's Exhibits: The plaintiff may object to certain of the

defendants' exhibits on the grounds of relevance and hearsay.

2. Defendant's Exhibits: The defendants may object to certain of the plaintiff's exhibits on the grounds of relevance and hearsay.

D. Depositions:

No depositions will be offered.

E. Objections to Depositions:

1. Defendants object to plaintiff's depositions as follows:

None.

2. Plaintiff objects to defendants' depositions as follows:

None.

VIII.

The following witnesses may be called by the parties upon trial:

A. Plaintiff's Witnesses:

1. Alex Seiver, Nevada State Prison, Carson City, Nevada
2. Johnny Lee Brown, Nevada State Prison, Carson City, Nevada
3. Brian Marshall, Nevada State Prison, Carson City, Nevada
4. Carlos Shanklin, Nevada State Prison, Carson City, Nevada
5. Jon Benjamin Odoms, Nevada State Prison, Carson City, Nevada
6. Kenneth Krause, Nevada State Prison, Carson City, Nevada
7. Daniel Richman, Nevada State Prison, Carson City, Nevada
8. Larry Facell, Northern Nevada Correctional Center, Carson City, Nevada
9. George Grimble, Nevada State Prison, Carson City, Nevada

B. Defendant's Witnesses:

1. All defendants
2. Dr. Mellonese Harrison, Nevada State Prison, Carson City, Nevada
3. Don Helling, Chief Correctional Casework Specialist, Nevada State Prison, Carson City, Nevada

IX.

Plaintiff and defense counsel have met and herewith submit a list of three (3) agreed upon trial dates which fall on either the second or fourth Tuesday of the month and which days are not earlier than forty-five (45) nor more than one hundred twenty (120) days from the date this stipulated pre-trial order is filed with the clerk. It is expressly understood by the undersigned that the clerk will set the trial of this matter on one of the agreed upon dates if possible; if

not, the trial will be set at the convenience of the court's calendar.

February 14, 1989

February 28, 1989

March 14, 1989

X.

It is estimated that trial herein will take five (5) days.

DATED this 7th day of December, 1988.

APPROVED AS TO FORM AND CONTENT:

_____
Plaintiff

_____
Attorney for Defendant

XI.

ACTION BY THE COURT

(a) This case is set down for trial on the STACKED calendar on April 18, 1989, at 9:30 A.M. Calendar call shall be at 8:30 a.m. on April 17, 1989.

(b) Motions in limine, if any, shall be filed and served not later than March

20, 1989 at 4:00 PM. Responses thereto shall be filed and served within two weeks thereafter. Such motions shall thereafter be submitted to the Court for decision without the filing of a final reply.

(c) Trial briefs shall be filed in original and two copies on or before April 10, 1989; the original shall be filed in the case file and the copies submitted to the Court. Briefs submitted without the extra copies shall be returned by the Clerk for compliance with this paragraph.

(d) Jury trials:

(1) Jury instructions requested by either party shall be submitted in the following manner:

On or before April 10, 1989, each party shall file an original and two copies of the following:

(i) A list, by number only, of any requested stock

instructions that are found in Devitt & Blackmar, Nevada Pattern or BAJI.

(ii) Each requested special instruction with citations to authority designated thereon.

All instruction, both stock and special, approved by the Court for submission to the jury, will be retyped by the Court.

(2) Suggested questions of the parties to be asked of the jury panel by the Court on voir dire shall be filed in original and two copies on or before April 10, 1989. Questions submitted without the extra copies shall be returned by the Clerk for compliance with this paragraph.

(e) Court trials: NOT APPLICABLE

(1) Proposed findings of fact and conclusions of law shall be filed in original and two copies on or before _____ _____. Proposed findings and conclusions submitted without the extra

copies shall be returned by the Clerk for compliance with this paragraph.

(f) Plaintiff and defense counsel shall serve a copy of any trial brief, proposed findings of fact and conclusions of law, proposed voir dire questions and proposed jury instructions upon the opposing party or his counsel contemporaneously with the filing thereof with the Court.

The foregoing pretrial order has been approved by the parties to this action as evidenced by the signature of plaintiff and defense counsel hereon, and the order is hereby entered and will govern the trial of this case. This order shall not be amended except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

DATED: January 9, 1988.

/s/Phyllis Halsey Atkins
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
(Caption omitted in printing)

MINUTES OF THE COURT

Case No. CV-N-87-36-ECR

(Filed September 29, 1989)

PRESENT: HONORABLE PHYLLIS HALSEY ATKINS

UNITED STATES MAGISTRATE

DEPUTY CLERK: Bette Stewart

Reporter/Recorder: N/A

Counsel for Plaintiff(s): William McKinney, in Proper Person

Counsel for Defendant(s): Kevin Higgins, Deputy Attorney General

MINUTES OF PROCEEDINGS:

2:07 p.m. Court convenes.

This is the time set for hearing on defendants' motion in limine (Item 45) and for calendar call.

Arguments are held. IT IS ORDERED that defendants' motion in limine (Item 45) is granted. Those witnesses permitted to testify for plaintiff are Brian

Marshall, Carlos Shanklin, Jon Benjamin Odoms and Daniel Richmond. The parties will enter into a stipulation as to specific testimony.

Court and counsel confer as to the trial procedure, exhibits and the form of verdict. Counsel for defendants will prepare a revised form of verdict.

Plaintiff advised the Court that he requires access to specific legal papers. IT IS ORDERED that counsel for defendants arrange that plaintiff have access to these documents.

Plaintiff moves for appointment of counsel. Said motion is denied.

3:00 p.m. Court adjourns.

CAROL C. FITZGERALD, CLERK

By /s/ Bette Stewart
Bette Stewart
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
(Caption omitted in printing)

MINUTES OF THE COURT

Case No. CV-N-87-36-ECR

(Filed October 3, 1989)

PRESENT: HONORABLE PHYLLIS HALSEY ATKINS

UNITED STATES MAGISTRATE

DEPUTY CLERK: Bette Stewart

Reporter/Recorder: Jeanne Lange

Counsel for Plaintiff(s): William McKinney, in Proper Person

Counsel for Defendant(s): Kevin Higgins, Deputy Attorney General

MINUTES OF JURY TRIAL (FIRST DAY):

9:50 a.m. Court convenes. Roll taken. Twenty-four jurors present; four absent. IT IS ORDERED that jurors Willis G. Anderson, Roberta Braham, George Chamarro and Beatrice Nation appear and show cause why they should not be held in contempt of court for not appearing for jury duty. Both parties stipulate to proceed with

the jury trial in absence of those prospective jurors who failed to appear. Jury impanelment from 10:03 a.m. to 10:52 a.m.

11:02 a.m. Court recesses.

11:17 a.m. Court reconvenes. All present. Plaintiff's opening statement from 11:18 a.m. to 11:25 a.m. Defendants' opening statement from 11:26 a.m. to 11:34 a.m. Daniel C. Richmond, called as a witness by the plaintiff, is sworn, testifies, and is excused. Defendants' Exhibits J and K are marked and admitted. (11:35 a.m. - 11:52 a.m.)

Carlos O'Neill Shanklin, sworn as a witness for the plaintiff, testifies on direct examination. Plaintiff's Exhibit 1 and 2 are marked and admitted. Plaintiff's Exhibit 3 is marked and rejected. (11:55 a.m. - 12:11 p.m.)

12:11 p.m. Court recesses.

1:37 p.m. Court reconvenes. All present.

Carlos O'Neill Shanklin, testifies for the plaintiff on cross and redirect examination and is excused. Defendants' Exhibit M i marked and admitted. (1:37 p.m. - 1:47 p.m.)

John Benjamin Odoms, is called as a witness for the plaintiff, sworn, testifies and is excused. Defendants; Exhibit L is marked and admitted. (1:49 p.m. - 2:21 p.m.)

At the request of plaintiff, Court recesses at 2:22 p.m. 2:29 p.m. Court reconvenes. All present.

Brian Marshall, called as a witness for the plaintiff, is sworn, testifies and is excused. Defendants' Exhibit N is marked and admitted. (2:30 p.m. - 2:44 p.m.)

William McKinney is sworn and testified on his own behalf. Defendants' Exhibit F is marked. Defendants; Exhibits A, B, C, D, E, G, H, and I are marked and admitted. (3:30 p.m. to 4:22 p.m.)

Plaintiff's Exhibits 4 through 13 are marked and admitted.

IT IS ORDERED that jury trial be continued until October 3, 1989 at 9:30 a.m.

4:34 p.m. The jury is excused.

Plaintiff moves to introduce into evidence certain medical literature, copies of publications, advertisements, etc. Argument is held. The Court received the material and takes the matter under submission.

Defendants move for a directed verdict pursuant to Rule 50(a). Arguments held. The Court takes the matter under submission.

5:36 p.m. Court adjourns.

CAROL C. FITZGERALD, CLERK

By /s/ Bette Stewart
Bette Stewart
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
(Caption omitted in printing)

MINUTES OF THE COURT

Case No. CV-N-87-36-ECR

(Filed October 3, 1989)

PRESENT: HONORABLE PHYLLIS HALSEY ATKINS

UNITED STATES MAGISTRATE

DEPUTY CLERK: Bette Stewart

Reporter/Recorder: Jeanne Lange

Counsel for Plaintiff(s): William McKinney, in Proper Person

Counsel for Defendant(s): Kevin Higgins, Deputy Attorney General

MINUTES OF JURY TRIAL (SECOND DAY):

9:50 a.m. Court convenes out of the presence of the jury.

Plaintiff moves to reopen his case, filing and serving said written motion. Arguments are held. Said motion is denied.

That material which plaintiff moves to introduce into evidence on October 2,

1989, is marked as Plaintiff's Exhibit 14. Plaintiff's motion to introduce said material into evidence is denied, and Plaintiff's Exhibit No. 14 is rejected. Defendants' motion for a directed verdict pursuant to Rule 50(a), Fed.R.Civ.P., in favor of the defendants and against the plaintiff, is granted. The defendants will prepare proposed form of judgment.

10:37 a.m. The jury returns to the court-room and is excused.

10:39 a.m. Court adjourns.

CAROL C. FITZGERALD, CLERK

By /s/ Bette Stewart
Bette Stewart
Deputy Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

William K. Suter
Clerk of the Court

Area Code 202
479-3011

June 29, 1992

Kevin G. Higgins, Esquire
Deputy Attorney General of Nevada
Capitol Complex
Carson City, Nevada 89710

Re: 91-1958 - Donald L. Helling, et al. v. Willima (sic) McKinney

Dear Mr. Higgins:

The Court today entered the following order in the above stated case:

> "The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted."

Enclosed are Memoranda describing the time requirements and procedures under the Rules, together with a Specification Chart for your use.

Please note that this case will be argued in the December or January Session. Requests for extensions of time to file briefs on the merits are not

favored. The Court requests that this case be briefed during it recess.

If you have any questions, please feel free to telephone me.

Very truly yours,

WILLIAM K. SUTER, CLERK

/s/ Sandy Nelsen
Sandy Nelsen
Assistant Clerk

Enclosures

Supreme Court, U.S.
FILED
AUG 27 1992
OFFICE OF THE CLERK

No. 91-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,

Petitioners,

v.

WILLIAM McKINNEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

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BROOKE A. NIELSEN
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*Counsel of Record

PETITION FOR CERTIORARI FILED JUNE 3, 1992
CERTIORARI GRANTED JUNE 29, 1992

QUESTION PRESENTED

WHETHER, IN THE ABSENCE OF ANY MEDICAL PROBLEMS, A STATE PRISON INMATE STATES AN EIGHTH AMENDMENT CLAIM FOR CRUEL AND UNUSUAL PUNISHMENT BY ALLEGING COMPELLED EXPOSURE TO SECONDARY TOBACCO SMOKE POSES AN UNREASONABLE RISK TO HIS HEALTH; AND WHETHER THE COURT OF APPEALS PROPERLY ADDRESSED THIS ISSUE ON REMAND FROM THE UNITED STATES SUPREME COURT.

LIST OF PARTIES

When respondent filed his action, petitioners were all employees of the Nevada Department of Prisons.

Respondent, William McKinney, was and continues to be, a prisoner confined within the Nevada Department of Prisons.

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No. 91-1958

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,*

Petitioners,

v.

WILLIAM MCKINNEY,

Respondent.

PETITIONERS' BRIEF ON THE MERITS

---

*The named petitioners have succeeded Pat Anderson, H. L. Whitley, George Sumner and John Nye, respondents-appellees below, in office. The named petitioners are substituted as parties to this action in accordance with Supreme Court Rule 35(3).

OPINIONS AND JUDGMENTS BELOW

There are two relevant opinions of the Ninth Circuit Court of Appeals which apply to this case. The first opinion is McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991), reprinted in Appendix C to the Petition for Certiorari [hereinafter referred to as McKinney I].

The second opinion, issued on remand from the United States Supreme Court, is McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992), reprinted in Appendix A to the Petition for Certiorari [hereinafter referred to as McKinney II].

The Amended Judgment of the United States Supreme Court, granting the first Petition for Writ of Certiorari, vacating McKinney I and remanding the case for reconsideration, was entered on October 15, 1991, and is reprinted in Appendix B attached to the Petition for Certiorari.

The Order Entering Judgment in Favor of Defendants following trial in the United States District Court for the District of Nevada, entered October 27, 1989, is reprinted in Appendix D attached to the Petition for Certiorari.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory provision is involved in this case: Nev. Rev. Stat. § 202.2491, which is reprinted in Appendix F attached to the Petition for Certiorari.

The Eighth Amendment to the United States Constitution.

STATEMENT OF THE CASE

William McKinney [hereinafter McKinney] is an inmate within the Nevada Department of Prisons system, serving a life sentence for murder. On January 28, 1987, he filed a civil rights complaint (See Joint Appendix) alleging he had been

subjected to cruel and unusual punishment in violation of the Eighth Amendment from having been involuntarily exposed to secondary (environmental) tobacco smoke [hereinafter "ETS"]. He sought damages and injunctive relief, claiming his health had been damaged.

The issues relevant to this appeal agreed upon by the parties in their proposed joint pretrial order include:

> 1. *Have the defendants been deliberately indifferent to the serious medical needs of McKinney,* and have they therefore violated his right to be free from cruel and unusual punishment?
>
> 2. *Does McKinney have a constitutional right to be housed in a smoke-free environment?*...
>
> 5. Is McKinney entitled to injunctive relief prohibiting the defendants from housing him in any wing of any unit which also houses smokers?

(See Proposed Joint Pre-Trial Order in Joint Appendix).

At the close of plaintiff's case-in-chief, the Magistrate granted defendants'

motion for a directed verdict, finding that as a matter of law, there is no constitutional right to be housed in a smoke-free environment. The Magistrate also specifically found McKinney had failed to show either a serious medical need or deliberate indifference to it. (Appendix D to Petition for Certiorari).

McKinney appealed the Magistrate's decision on numerous grounds, including whether the Magistrate erred in holding McKinney was not entitled to a smoke-free prison environment.

In its first decision in this case [McKinney I], the Ninth Circuit held McKinney could state an Eighth Amendment claim by alleging involuntary exposure to levels of ETS posed an unreasonable risk of harm to his health, and remanded the case to the district court for further proceedings to allow McKinney to present evidence regarding his exposure to ETS

and whether such exposure created an unreasonable risk of harm to his health. [Appendix A to Petition for Certiorari].

After the Ninth Circuit denied the Petition for Rehearing and Rehearing En Banc, defendants filed their first Petition for Writ of Certiorari (No. 91-269). This Court granted the petition, vacated the judgment of the Ninth Circuit, and remanded the case for reconsideration in light of Wilson v. Seiter, 111 S. Ct. 291 (1991) [hereinafter Seiter] [Appendix B to Petition for Certiorari].

On remand, the Ninth Circuit *affirmed* its earlier decision, stating:

> The [Supreme] Court's establishment in Seiter of a subjective component for an Eighth Amendment claim does not vitiate our determination of what satisfies the objective component. Our holding that it is cruel and unusual punishment to house a prisoner in an environment that exposes him to levels of ETS that pose an unreasonable risk of harming his health constitutes the objective component of McKinney's Eighth Amendment claim. Seiter simply adds another element to

> an Eighth Amendment claim that McKinney must prove.
>
> In our opinion we agreed with the magistrate's ruling that directed a verdict on the issue of defendants' deliberate indifference to McKinney's serious existing medical symptoms. As McKinney points out, indifference to current medical problems is distinct from indifference to the problem of involuntary, long term exposure to unreasonable levels of ETS. Accordingly, we remand for further proceedings to determine whether the prison officials showed deliberate indifference to McKinney's long term exposure to ETS.

McKinney II, at 3043.

Defendants filed their second Petition for Writ of Certiorari following the Ninth Circuit's decision on remand, granted June 29, 1992. (See Joint Appendix.)

JURISDICTION

The jurisdiction of this Court to review the judgment of the Ninth Circuit Court of Appeals upon a petition for writ of certiorari arises under 28 U.S.C. § 1254(a).

. . .

SUMMARY OF THE ARGUMENT

An inmate's exposure to environmental tobacco smoke [ETS], in the absence of related health problems, does not violate the Eighth Amendment proscription against cruel and unusual punishment.

In most prisons, smokers constitute between 70 and 90 percent of the inmate population. Housing options are limited, and there is a constant flow of inmate transfers, necessitating reevaluations and changes in cell assignments. The mere fact that a non-smoking inmate may from time to time be housed with a smoking inmate, or otherwise exposed to ETS from inmates and correctional officers, does not deprive an inmate of the minimal civilized measure of life's necessities, nor does it constitute an affront to the dignity of man. Exposure to ETS does not inflict pain under the Eighth Amendment definition.

The Ninth Circuit erred not only in deciding McKinney's claim met the objective test of Seiter, but in remanding the question of whether McKinney could establish the subjective requirement of deliberate indifference. The Ninth Circuit ignored the Magistrate's specific factual findings, based on the record, that McKinney had failed to show *any* deliberate indifference on the part of defendants.

The Ninth Circuit appears to be the only court which has determined exposure to ETS creates an Eighth Amendment cause of action. Other circuit courts and district courts recently addressing this issue have rejected this conclusion, indicating it should be left to the legislative and administrative branches of government. These courts have specifically pointed to the difficulties of managing prison systems within limited

resources, and that inmates with health problems related to exposure to ETS are protected by their right to adequate medical treatment. Courts have concluded this type of possible health risk does not reach the level of an Eighth Amendment claim compared with other more serious, immediate risks, and some courts have pointed out free citizens have no constitutional protection from ETS.

Prison administrators cannot remove all potential risks to which inmates may be exposed, just as society does not eliminate all risks, including exposure to ETS, faced by non-incarcerated persons. It is the function of prison officials, trained and experienced in matters involving the classification and housing of inmates, to identify and weigh the myriad of risks facing each inmate and to determine the appropriate placement of all inmates within the limita-

tions of budget, facilities, population, safety and security, and other factors.

ARGUMENT

A. Under an Analysis of The Eighth Amendment As It Applies to Prison Conditions Claims, Inmate Exposure To Tobacco Smoke Is Not Cruel and Unusual Punishment.

In Trop v. Dulles, 356 U.S. 86, 100 (1958), this Court stated the basic concept underlying the Eighth Amendment was the dignity of man.

In Estelle v. Gamble, 429 U.S. 97, 102-103 (1976), this Court described the history behind the prohibition against cruel and unusual punishments,

> The [Eighth] Amendment embodies "broad and ideaiistic concepts of dignity, civilized standards, humanity, and decency...," Jackson v. Bishop, 404 F.2d 571, 579 (CA8 1968), against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society," [Trop v. Dulles at 101...] or which "involve the unnecessary and wanton infliction of pain," [Gregg v. Georgia at 173..].

. . .

In Ingraham v. Wright, 430 U.S. 651, 669-670 (1977), the Court made clear that the Eighth Amendment prohibition against cruel and unusual punishment was designed to protect those convicted of crimes,

> The prisoner's conviction entitles the State to classify him as a "criminal," and his incarceration deprives him of the freedom "to be with family and friends and to form the other enduring attachments of normal life." Morrissey v. Brewer, 408 U.S. 471, 482 (1972); see Meachum v. Fano, 427 U.S. 215, 224-225 (1976).

In Bell v. Wolfish, 441 U.S. 520, 545-546 (1979), this Court noted that,

> [C]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison...[but] simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations.

The Court in Bell quoted with approval from Pell v. Procunier, 417 U.S. 817 (1974):

> [T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. *Prison administrators therefore should be accorded wide-*

> *ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security*. [citations omitted] ... [C]ourts should ordinarily defer to their expert judgment.

Id. at 547-548 (emphasis added).

The Court also quoted Procunier v. Martinez, 416 U.S. 396, 405-406 (1974),

> Prison administrators are responsible for maintaining internal order and discipline.... Suffice it to say that *the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree*. *Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government*.

Id. at 548, n.30 (emphasis added).

In Rhodes v. Chapman, 452 U.S. 337, 345-346 (1981), this Court held that double celling was not cruel and unusual punishment and explained the Court's interpretation of the Eighth Amendment,

> The Eighth Amendment, in only three words, imposes the constitutional limitation upon punishments: they cannot be "cruel and unusual."

...Today the Eighth Amendment prohibits punishments which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain..." Among "unnecessary and wanton" inflictions of pain are those that are "totally without penological justification"...

The Court has held, however, that "*Eighth Amendment judgments should neither be nor appear to be merely the subjective views" of judges*. Rummel v. Estelle, 445 U.S. 263, 275 (1980) ... "the Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability" of a given punishment.... But such "judgment[s] should be informed by objective factors to the maximum possible extent."

Id. (emphasis added).

In Rhodes, the Court stated there was no evidence double-celling inflicts pain, only a theory this may be so, which may,

> [R]eflect an aspiration toward an ideal environment for long-term confinement. But *the Constitution does not mandate comfortable prisons, and prisons...which house persons convicted of serious crimes, cannot be free of discomfort*. Thus, these considerations properly are weighed by the legislature and prison administration rather than a court.

Id. at 348-349 (emphasis added).

In Seiter, this Court held an inmate challenging conditions of confinement as cruel and unusual punishment must show prison officials acted with deliberate indifference, i.e., a subjective inquiry must be made in addition to establishing the objective part of an Eighth Amendment claim.

> To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety.... It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishment Clause....
>
> These cases mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment....

Id. at 2324, citing Whitley v. Albers, 475 U.S. 312, 319 (1986).

The Court noted that a claimant has always been required to establish a mental state where cruel and unusual punishment is alleged and the appropriate

standard in cases involving conditions of confinement was deliberate indifference.

> "Whether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in Estelle." [quoting from LaFaut v. Smith, 834 F.2d 389, 391-392 (CA4 1987).

Seiter, at 2327.

In Hudson v. McMillian, 112 S. Ct. 995 (1992), this Court applied the Seiter standard holding the use of excessive physical force against a prisoner may constitute cruel and unusual punishment even where the prisoner does not suffer significant injury, but the seriousness of the injury is a relevant factor in determining whether an Eighth Amendment violation has occurred. Regarding the application of Seiter to inmate claims involving conditions of confinement, the Court stated,

. . .

> Wilson [v. Seiter] extended the deliberate indifference standards applied to Eighth Amendment claims involving medical care to claims about conditions of confinement. In taking this step, we suggested that the subjective aspect of an Eighth Amendment claim (with which the Court was concerned) can be distinguished from the objective facet of the same claim. Thus, courts considering a prisoner's claim must ask both if "the officials act[ed] with a sufficiently culpable state of mind" and if the alleged wrongdoing was objectively "harmful enough" to establish a constitutional violation....
>
> The objective component of an Eighth Amendment claim is therefore contextual and responsive to "contemporary standards of decency." Estelle, 429 U.S. at 103... For instance, *extreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is "part of the penalty that criminal offenders pay for their offenses against society*," Rhodes, supra, 452 U.S. at 347, 101 S. Ct. at 2399, "*only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation*." Wilson, supra, 501 U.S. at ____, 111 S. Ct. at 2324....

Hudson, at 999-1000 (emphasis added).

There are many risks, immediate and long term, which are faced by people in our society. As a practical matter, some

of these risks can be eliminated, some cannot, and others it would appear society as a whole does not wish to eliminate (e.g., motor vehicles, airplanes, swimming pools, and other obvious sources of risk to one's health). Over the years, medical studies have concluded there are substances which may pose a future risk of harm to human beings. These include alcohol, cigarettes, saccharin, asbestos, high cholesterol diets, overexposure to sun, etc. The precise risk of future harm to any particular person depends upon a wide variety of factors, such as age, health, length and degree of exposure, personal habits, and other considerations.

The likelihood and degree of a particular risk affecting a specific individual is too speculative, however, to warrant Eighth Amendment protection. Certainly, no deprivation of the basic

necessities of life occurs by exposure to ETS, a condition of our society tolerated by incarcerated persons, albeit reluctantly by many. Exposure by an inmate to ETS therefore is neither cruel nor unusual by contemporary standards.

In a prison setting, some risks are virtually eliminated, such as traffic-related injuries and drownings. Some risks are perhaps greater and more immediate in prison than they would be outside prison, such as incidents of violence resulting from enemy situations, escape attempts, and racial tensions. The increased risk may be associated with the antisocial behaviors typically found in convicted felons, and the inability of many of them to adjust to the restrictions of prison life. Without question, prison officials daily are confronted with the exceptionally difficult tasks of housing, classifying, rehabilitating,

controlling and protecting persons who are among the most violent, unpredictable, uncooperative, manipulative and dissatisfied members of our society.

Prison officials cannot be subjected to a never-ending barrage of civil rights lawsuits, in which inmates ask the federal courts to second-guess every classification and housing decision which incidentally results in smoking and non-smoking inmates sharing a cell for a period of time.

B. This Court Should Resolve Conflicting Circuit Decisions By Reversing The Decision Of The Ninth Circuit On Remand (McKinney II).

In addition to the Ninth Circuit's McKinney II decision, there are two circuit court cases addressing the question of inmate exposure to ETS decided after Seiter, both of which determined that *no* Eighth Amendment violation occurred.

. . .

The Tenth Circuit, following a rehearing and rehearing en banc in Clemmons v. Bohannon, 956 F.2d 1523 (10th Cir. 1992) [Clemmons II], applied the Seiter test and rejected an inmate's claim that his Eighth Amendment rights were violated by his exposure to ETS. The inmate had alleged no specific health problems, but maintained ETS created an unreasonable risk to his health.

The court in Clemmons II acknowledged its concern "that exposure to ETS is a potential health hazard, [but] we cannot agree that exposure to ETS rises to the level of an Eighth Amendment violation in this case because the record reveals absolutely no evidence that Clemmons' health has been adversely affected by the cigarette smoke produced by his cellmate." Clemmons II, at 1525.

The Tenth Circuit stated:

Neither the Supreme Court nor this court has ever held that a poten-

> *tial, distant harm to a prisoner's health is a serious medical need*.... "[C]onditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional" even if those conditions are sometimes "restrictive and even harsh." Rhodes, 452 U.S. at 347. Clemmons' complaint regarding ETS is simply of a lesser magnitude than those cases that have found an Eighth Amendment violation due to deliberate indifference to serious medical need.

Id., at 1527-1528 (emphasis added).

The Seventh Circuit, in Steading v. Thompson, 941 F.2d 498, 500 (7th Cir. 1991), considered the claim of an asthmatic inmate that his exposure to ETS was cruel and unusual punishment. Applying Seiter, the Steading court held there was no evidence to show a culpable state of mind on the part of defendants.

> Secondary tobacco smoke is common in offices, restaurants, and other public places throughout the United States and the rest of the world. No one supposes that restaurateurs who allow smoking are subjecting their other patrons to "punishment", or desire to harm them. The guards and administrators who breathe *smoky* air in the prison are not punishing themselves. No one would suppose, either, that the

> gentlemen tobacco farmers who wrote and adopted the eighth amendment could have conceived of smoke as punishment. Evidence since 1791 presents tobacco in a different light, but debate persists about how severe the effects of secondary smoke may be.

The Steading court pointed out that an inmate with serious medical problems which can be attributed to or worsened by exposure to smoke are entitled to appropriate medical treatment, "which may include removal from places where smoke hovers." Id. 500. However, in the absence of evidence that prison officials intended to *punish* the inmate by placing him in a cell with a smoker, the Eighth Amendment claim failed.

The Fifth Circuit has considered the ETS issue although its decision was made prior to Seiter. In Wilson v. Lynaugh, 878 F.2d 846 (5th Cir. 1989), the court refused to consider the appellant's previously litigated Eighth Amendment claim, re-instigated following new

studies regarding the possible effects of ETS. The court cited with approval from Gorman v. Moody, 710 F. Supp. 1256 (N.D. Ind. 1989),

> [I]t is also relevant to our Eighth Amendment analysis that "society cannot yet completely agree on the propriety of nonsmoking areas and a smoke-free environment."

Gorman, at 1262.

In Gorman, the district court said "smoking is a societal issue best resolved by the executive and legislative branches of government." Id. at 1262.

> The operation of our correctional facilities "is peculiarly the province of the legislative and executive branches of our government, not the judicial." [citations omitted]... *Whether to provide smoke-free areas must be left to the discretion of legislatures and prison officials who must operate the prisons to the best of their abilities, and those officials must make those decisions after a consideration of all factors relevant to the particular institution and the care and wellbeing of all inmates*.

Id. at 1262 (emphasis added).

Lower courts have uniformly held that where an inmate has an existing serious

medical condition which may worsen with exposure to ETS, a valid Eighth Amendment claim is stated. See, e.g., Beeson v. Johnson, 668 F. Supp. 498 (E.D.N.C. 1987); West v. Wright, 747 F. Supp. 329, 332 (E.D.Va. 1990); Gorman v. Moody, 710 F. Supp. at 1262; Steading v. Thompson, 941 F.2d at 500.

A few cases have held that where prison officials had made some effort to accommodate an inmate's complaints about ETS, there was no Eighth Amendment violation. West v. Wright, 747 F. Supp. 329 (E.D.Va. 1990); Johnson v. Moore, 944 F.2d 1533 (9th Cir. 1991).

Courts (other than the Ninth Circuit) have expressed concern about the potential health risk of exposure to ETS. However, these other courts, in deciding no Eighth Amendment claim has been stated, have done so based largely on the following factors: (a) society does not

yet agree upon the extent of the risk of exposure to ETS; (b) if an inmate's health requires minimal exposure to ETS, then prison officials must make good faith efforts to accommodate the situation; (c) this issue should be resolved by the legislative and administrative branches of government charged with the responsibility for management of prison systems; (d) exposure to ETS does not reach the threshold of alleged deprivation or pain for which an Eighth Amendment claim can be stated; (e) permitting an inmate to state a claim for exposure to ETS will subject prison officials to a boundless plethora of claims by inmates that they have been exposed to all types of potential health risks; and (f) unincarcerated citizens have no constitutional protection from exposure to ETS.

. . .

. . .

C. The Ninth Circuit Erred In Holding Exposure To Environmental Tobacco Smoke May Violate An Inmate's Eighth Amendment Rights.

1. The Court Erred In Determining The Evolving Standards Of Decency.

The Ninth Circuit on remand, affirmed its earlier McKinney I decision, in which it relied on reports from the Surgeon General and Environmental Protection Agency regarding the association between ETS and lung cancer, and on its observation that a number of prisons and jails were "beginning to take steps to restrict or ban smoking." [Appendix C to Petition for Certiorari] .

The Ninth Circuit also cited numerous state statutes regulating smoking in public buildings, and specifically referred to Nev. Rev. Stat. § 202.249.

The Ninth Circuit, however, did not acknowledge that a number of states, including Nevada, *exempt* prison facilities from smoking regulations. (See

Nev. Rev. Stat. § 202.249, Appendix F to the Petition for Certiorari.) This is the community standard in Nevada on the application of its laws restricting smoking in public buildings. There are *other* states with statutes regulating smoking in public buildings which also exempt correctional facilities.

Some states' restrictions on smoking are limited to areas *open to the public*, thereby excluding inmate housing. As Judge Tacha stated in his dissent in Clemmons v. Bohannon, 918 F.2d 858, 872 (1990) [hereinafter referred to as Clemmons I], "a review of the state legislation cited by the majority as forbidding or restricting smoking reveals that the *vast majority of these laws are limited to public places*, which are statutorily defined so as to exclude prisons."

Consequently, although the trend in society is toward the protection of non-

smokers in certain public places, such protections have *not* necessarily been extended to prisons in deference to the unique problems associated with the management and classification of inmates. This is the standard of decency which should have been recognized by the Ninth Circuit.

The court may look not only to legislative enactments to determine the standards of decency in our society, but also to case law involving free citizens (as opposed to inmates) challenging the tolerance of ETS in enviro ts such as the workplace.

In Kensell v. State of Oklahoma, 716 F.2d 1350 (10th Cir. 1983), the court rejected a state employee's claim he had a right to a smoke-free working environment,

> The intrusions upon the plaintiff's person resulting from working with fellow servants who smoke is a far cry from forcible injections of mind

> altering drugs and assaults committed by police or prison officials to intimidate or punish persons in their custody. This is not a case in which governmental officers are abusing power they possess only because the government is sovereign...*the United States Constitution does not empower the federal judiciary, upon the plaintiff's application, to impose no-smoking rules in the plaintiff's workplace*. *To do so would support the most extreme expectations of the critics who fear the federal judiciary as a superlegislature promulgating social change under the guise of securing constitutional rights*....

Id. at 1351 (emphasis added).

In Gasper v. Louisiana Stadium and Exposition District, 418 F. Supp. 716 (E.D.La. 1976), the court held the failure of the operators of the New Orleans Superdome to prohibit smoking by the public did not violate the constitutional rights of non-smokers who chose to attend events in that facility.

The United States District Court for the District of Columbia in Federal Employees for Non-Smokers' Rights (FENSR)

. . .

v. United States, 446 F. Supp. 181 (1978), cited with approval from Gasper,

> It is well established that the *Constitution does not provide judicial remedies for every social and economic ill*. Lindsey v. Normet, 405 U.S. 56, 82 S. Ct. 862, 31 L.Ed.2d 36 (1972). Accordingly, if this Court were to recognize that the Fifth and Fourteenth Amendments provide the judicial means to prohibit smoking, it would be creating a legal avenue, heretofore unavailable, through which an individual could attempt to regulate the social habits of his neighbor.
>
> *For the constitution to be read to protect nonsmokers from inhaling tobacco smoke would be to broaden the rights of the Constitution to limits heretofore unheard of, and to engage in that type of adjustment of individual liberties better left to the people acting through legislative processes*....
>
> This Court finds the facts of Gasper indistinguishable and will adopt its approach. *Without in any way denigrating the importance of plaintiffs' environmental concerns, the Court firmly believes that such matters are better left to the legislative or administrative process, where a proper balancing of interests can be made in a forum where such social decisions can more appropriately be made*.

Id. at 185 (emphasis added).

. . .

. . .

2. The Subjective "Deliberate Indifference" Requirement Was Not Met By McKinney At Trial, And He Is Not Entitled To A Re-trial.

In the Order Entering Judgment in Favor of Defendants [Appendix D of the Petition], the Magistrate specifically stated:

> Based upon the testimony adduced by McKinney during his presentation of his case, he *has failed to show either a serious medical need or deliberate indifference to it*....

Order, at 4.

> *There was no evidence presented of personal involvement by any of the Defendants, nor in accordance with the test announced in Beeson above, was there any indication that any of the Defendants intentionally chose to inflict harm upon the Plaintiff*.

Order, at 6.

Inexplicably, the Ninth Circuit appeared to be under the mistaken assumption that the Magistrate had not permitted McKinney to present evidence of his exposure to ETS and of defendants' alleged deliberate indifference to the

risk to his health. The record clearly shows McKinney was (a) permitted to testify on his own behalf; (b) permitted to examine inmate witnesses he claimed had observed his problems; and (c) permitted to admit all but two of his exhibits [the rejected exhibits were one set of interrogatories and a packet of anti-smoking brochures and flyers.]

McKinney was given every opportunity to present his case, and the Ninth Circuit offers no explanation for its statement that he was not. It was McKinney's job, not the Magistrate's, to offer credible and admissible evidence sufficient to satisfy his burden of proof. The Magistrate's ruling was that he did not accomplish this, and there is nothing in the record to indicate her decision was an abuse of discretion.

From the evidence presented at trial, including plaintiff's and defendants'

exhibits, McKinney attempted to relate any physical problems he was experiencing to a variety of sources, not just secondary tobacco smoke. He attributed nose bleeds to having to be in a bunk downstairs rather than upstairs. [Def.Ex.B.] He complained that his coughing, sore throat, burning eyes, runny nose, dizzy spells and stomach aches were caused by butane heater fumes. [Def.Ex.C and D.] He asked for medical treatment for throat irritation which he stated was caused by the drinking water and cigarette smoke. [Def.Ex.E.] He attributed sore throats, vomiting, scratching and dizziness to drinking water. [Def.Ex.I-17.] McKinney filed a grievance requesting sugar instead of saccharin with his meals on the grounds "there is an abundance of scientific authority that suggest that saccharin may cause cancer in humans..." and complaining the saccharin caused him

to have headaches, muscle pain and vomiting. [Def.Ex.I-19.] A review of the exhibits shows medical staff responded to his complaints. (See Magistrate's Order, Appendix D to Petition for Certiorari.)

The evidence presented at trial showed staff had attempted to accommodate McKinney's requests, but not all possible alternatives were acceptable to him, and he declined several bed moves. [Def.Ex. F.] He stated he could not get along with 80 percent of the blacks at NSP. [Def.Ex.F.] On June 19, 1988, he complained that his roommate was smoking in the cell [Def.Ex. I-25; also Pl.Ex. 1], and a few days later complained again, stating the smoke caused him to be nauseous, his nose to bleed, and irritated his eyes and throat. [Def.Ex. I-26.] However, when McKinney was contacted by the unit counselor about this complaint, the counselor "was informed by you

[McKinney] that you no longer wanted this move and that your roommate's smoking was not a problem at this time." [Def.Ex. I-26.] McKinney complained about his roommate's smoking in August, 1988, but refused the bed move offered him and was advised there were no available single cells as an alternative at that time. [Def.Ex. I-32; also Pl.Ex. 2.] McKinney also wrote to the warden in April, 1987, stating he did not want to move into Unit 4 because he had "too many enemies in Unit 4." [Def.Ex. F.] In August, 1988, McKinney's counselor advised him she had requested a bed move for him to a cell in single housing. [Pl.Ex. 6.]

McKinney, in his various notes to prison officials, not only rejected alternatives offered to him, he continued to attempt to manipulate a single cell for himself. [Pl.Ex. 5; Def.Ex. I-32.]

. . .

Interestingly enough, one exhibit, an Inmate Personal Property Claim Form for Loss or Damage of Personal Property completed by McKinney in July, 1989, lists as lost items belonging to him "2 cartons of cigarettes (Kools and Camels)." [Def.Ex.H.]

It is commonplace for inmates to employ a boundless variety of manipulative techniques in order to procure such things as unit or facility transfers, single cells, sharing a cell with a friend, certain diets, desirable prison jobs, etc. Prison employees whose responsibility it is to decide such matters are faced with the ever-present task of evaluating the validity of each inmate's requests. Making a change for one inmate necessarily impacts prison resources, staff and other inmates. A change in just one cell assignment may create the need to re-evaluate and possibly alter

the cell assignments of other inmates. Typical methods used by inmates to obtain preferred housing include claims of enemy situations. Inmates claim medical problems or religious requirements in order to receive special foods, privileges, or housing arrangements.

A Pennsylvania District Court, in the context of inmate requests for transfers, has stated the problem well,

> Prison officials are presented with an arduous task when they are called upon to discern legitimate from illegitimate requests for a transfer within the prison. In an ideal world, prisoners would request a transfer based on a sincere fear of physical harm upon which prison officials could rely. However, in a more realistic world, prisoners may feign their fear of physical harm simply to manipulate a transfer. The reasons vary for prisoners to use such fear as a ruse to obtain a transfer - to dorm with a friend and/or to obtain better living quarters are examples. Therefore, when a prisoner requests a transfer because he fears for his life, prison officials are required to determine the credibility of his fear.

Mullen v. Unit Manager Weber, 730 F. Supp. 640 (M.D.Pa. 1990).

The record on appeal includes the affidavit of Don L. Helling, which was filed with the United States District Court on June 19, 1987, as Exhibit A to the defendants' opposition to McKinney's Motion for Preliminary Injunction. Helling stated, "[i]nstitutional security is, of course, the most important consideration [in classification decisions.]" He pointed out that,

> In classifying an inmate, the inmate's institutional history and criminal history are both relevant...inmates are first classified to a particular housing category such as general populations, protective custody, administrative segregation and disciplinary segregation...he is then assigned to a particular unit, wing and cell. Among the factors considered in making this decision are possible enemy situations, the age of the inmate, friendships and ethnic balance within particular housing wings. The personal desires of the inmate are also taken into account insofar as possible.

(See Joint Appendix).

Helling stated that if the classification committee could not place McKinney in any wing housing smokers, this would

unduly burden the process, severely limit housing options, and might make it impossible to place McKinney into a segregation unit should that become necessary. Helling also stated,

> Smoking is very important to many inmates, and I believe that if smoking were banned at NSP it would create a potentially dangerous situation due to the anger of those inmates who do smoke, and constitute a threat to the security of the institution.

The Ninth Circuit erred in ignoring the Magistrate's finding of no deliberate indifference, and should not have ordered a remand on this issue.

Without a showing by McKinney of any personal involvement *or* deliberate conduct on the part of petitioners, he *cannot* prevail on his Eighth Amendment claim. McKinney had his day in court, and failed to present credible evidence to support his claim. The Magistrate properly granted defendants' motion for directed verdict at the close of

McKinney's case in chief. It was error for the Ninth Circuit to attempt to give McKinney a "second shot" at presenting his evidence, ignoring the factual findings of the Magistrate.

3. The Objective Component Of The Eighth Amendment Claim Was Not Met By McKinney.

The Wilson court stated,

> The Constitution, we said "does not mandate comfortable prisons," id., at 349, and only those deprivations denying "the minimal civilized measure of life's necessities," id., at 347, are sufficiently grave to form the basis of an Eighth Amendment violation. [quoting from Estelle v. Gamble, 429 U.S. 97 (1976)].

Id. at 2324.

The Eighth Amendment prohibition against cruel and unusual punishment does not embrace the concept of an environment in prison which is free from varying levels of secondary tobacco smoke. Such an environment does not exist in the real world, save for those exceptions carved out by state legislatures applicable to

certain buildings open to and used by the general public. McKinney is not entitled to a prison cell meeting his standards of comfort, and his occasional exposure to ETS does not deprive him of "the minimal civilized measure of life's necessities."

The mere existence of a potential health risk does not constitute cruel and unusual punishment. If it did, inmates would be filing civil rights complaints every time they were exposed to another inmate with a cold. The Ninth Circuit stated at 14 of its Opinion [Appendix C],

> [W]hile not every deviation from ideally safe conditions may amount to a constitutional violation, we ruled [in Hoptowit v. Spellman] that conditions of confinement that seriously threaten the health and safety of the inmates are unconstitutional.

McKinney made no showing at trial that his health or safety had been threatened by exposure to ETS. That was sufficient for the Magistrate to have granted defendants' motion for a directed verdict.

The Ninth Circuit has ignored this Court's remand and has imprudently expanded upon those conditions of confinement which belong under the umbrella of Eighth Amendment protection. The mere possibility that something may cause a future risk of harm to one's health does not entitle an inmate to elimination of all potential health risks. The burden on state prison systems to comply with such a requirement would be insurmountable. Certainly, free citizens have no such entitlement to be free from potential health risks.

As much as one may sympathize with the discomfort some inmates experience when exposed to ETS, if there is no existing serious medical need which requires attention, there is no cruel and unusual punishment under the Eighth Amendment when compared under society's evolving standards of decency.

Clearly, exposure to ETS causes discomfort and annoyance to many people, and not to others. There may be a possible future risk of harm to others, but the urgency of removing the risk of harm from exposure to ETS is remote compared to the need to reduce or eliminate other more serious and immediate risks confronting inmates.

The Tenth Circuit Court has stated,

> The role of this Court is not to spearhead and define society's evolving standard of decency. Rather, this Court must interpret and apply the Constitution of the United States. *When the dissent attempts to create new standards of decency based on reports by the Environmental Protection Agency and the Surgeon General, it ceases to interpret the Constitution. Instead of applying constitutional standards, the dissent's reasoning mandates a public health ideal for all of society.* See Rhodes, 452 U.S. at 351, 101 S. Ct. at 2401.

In assessing claims that conditions of confinement are cruel and unusual, courts must bear in mind that their inquiries "spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility."

> (quoting Bell v. Wolfish, 441 U.S. 520, 539 (1979).

Clemmons II, at 1529 (emphasis added).

Tenth Circuit Court Judge Tacha, in his eloquent dissent in Clemmons I, stated "a constitutional right to a smoke-free cell would have no limits and it would open a Pandora's box of constitutional challenges for prison administrators," and there is,

> *[N]o justification whatsoever for making the rights of non-smoking prisoners paramount over the myriad of health and security concerns that prison officials must confront and balance daily*. At worst, the majority opinion lays the groundwork for a constitutional burden that will be impossible for prison authorities to carry,... At best, the majority imposes an unwarranted and unprecedented constraint on the discretion of prison administrators to balance potential versus immediate health and safety concerns.

Clemmons I, at 873 (emphasis added).

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4. The Eighth Amendment Claim As Determined By The Court Was Not The Issue On Appeal And Should Not Have Been Decided In The Absence Of Briefing By The Parties.

In granting defendants' motion for a directed verdict against McKinney, the Magistrate found that,

> McKinney failed to produce *any evidence* to support his claim that the defendants were deliberately indifferent to his serious medical symptoms...[and] as a matter of law, McKinney had no constitutional right to be free of secondary cigarette smoke.

Opinion, at 3, Appendix C, Petition for Certiorari (emphasis added).

The Ninth Circuit panel stated,

> The magistrate framed the issue in all-or-nothing terms: either McKinney had a constitutional right to a completely smoke-free environment, or he had only a constitutional right to medical attention for proven serious medical needs. By so doing, the magistrate excluded a valid eighth amendment claim lying between those two extremes: that compelled exposure to levels of ETS that pose an unreasonable risk of harm to human health constitutes cruel and unusual punishment.

Opinion, at 3, Appendix C, Petition for Writ of Certiorari.

The Ninth Circuit erred in two respects. First, the Magistrate did *not* frame the issues to be tried. The parties determined the issues in their proposed joint pre-trial order, which were whether defendants had been deliberately indifferent to McKinney's serious medical needs, and/or whether McKinney had a constitutional right to be housed in a smoke-free environment. Thus, the Magistrate merely ruled on the issues the *parties* had agreed upon for trial.•

Second, the question on appeal was not whether McKinney's constitutional rights had been violated by compelled exposure to secondary tobacco smoke, but rather was whether the Magistrate abused her discretion in granting the defendants' motion for a directed verdict. Under laws existing at that time, the Magistrate's ruling was entirely correct and

was not an abuse of discretion. The Ninth Circuit did not point to any abuse of discretion.

It was inappropriate for the Court of Appeals to consider an issue not tried, nor raised on appeal, nor briefed by the parties. See Matter of Texas Mortgage Services Corporation, 761 F.2d 1068, 1073 (5th Cir. 1985), which stated, "that issues not raised or argued *in the brief* of the appellant may be considered waived and thus will not be noticed or entertained by the court of appeals."

Similarly, in F&H Inv. Co. v. Sackman-Gilliland Corp., 728 F.2d 1050 (8th Cir. 1984), the court declined to reach an issue neither briefed, nor discussed at oral argument by either party.

The Ninth Circuit inappropriately chose to impose its own views on the desirability of inmate exposure to ETS without any notice to the parties and, at

the very least, should have asked the parties to submit additional briefing on the point. Petitioners could have advised the court of the accommodations generally made within the system for both smoking and non-smoking inmates, and could have referenced to trial exhibits which showed attempts by prison officials which *were* made to accommodate McKinney. Petitioners could have refuted or questioned the conclusions reached by the authorities upon which the Ninth Circuit chose to rely which were *not* part of the record on appeal.

CONCLUSION

For the reasons discussed above, the petitioners respectfully ask this Court

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to reverse the judgment of the Ninth Circuit Court of Appeals.

DATED: August 24, 1992

Respectfully submitted.

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No. 91-1958

Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DONALD L. HELLING, Associate Warden,
Nevada State Prison, *et al.*,

Petitioners,

v.

WILLIAM McKINNEY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does the State's recent adoption of a formal policy covering smoking in the Nevada state prison system make it inappropriate for the Court to decide the merits of this case?

2. Did the court of appeals correctly hold that a nonsmoking prisoner who is involuntarily exposed to unhealthy amounts of cigarette smoke has a claim for injunctive relief under the Eighth Amendment, if he can prove that the conditions of his confinement, viewed objectively, pose a serious hazard to his health and that prison officials showed deliberate indifference to his situation?

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In The

Supreme Court of the United States

October Term, 1992

No. 91-1958

DONALD L. HELLING, Associate Warden, Nevada State Prison, *et al.*,

Petitioners,

v.

WILLIAM McKINNEY,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

1. Proceedings in District Court.

Respondent William McKinney, a Nevada state prisoner, filed this action *pro se* in January 1987 in the United States District Court for the District of Nevada. His complaint, brought under 42 U.S.C. § 1983, claimed a violation of the Eighth Amendment to the United States Constitution based on his involuntary exposure in the Nevada State Prison to smoke from other people's cigarettes, also known as environmental tobacco smoke ("ETS"). Joint Appendix ("J.A.") 5, 14-15. Named as defendants were the Nevada director of prisons, the warden and associate warden of the Nevada State Prison, and the store manager and a counselor at that prison, who are the

petitioners in this Court and to whom this brief will refer collectively as "the State" (J.A. 1-4). [1]

McKinney, a non-smoker, complained of being forced to share a cell with a series of inmates who were heavy smokers, including his then-cellmate, who smoked five packs a day. He stated that prison officials refused to move him to a single cell or to house him with a non-smoking cellmate despite his repeated protests that forced inhalation of smoke was causing nosebleeds, headaches, chest pains, shortness of breath and lack of energy to exercise. He also objected to the fact that smoking is allowed in the prison law library, as it is everywhere in the prison, except the infirmary and the dining area (J.A. 6-11). He sought an injunction to bar prison officials from housing him with inmates who smoke, as well as damages from each defendant (J.A. 14). The State's answer admitted that Mr. McKinney had sought transfers from smoking cellmates "at various times," but denied doing nothing to separate smokers from non-smokers, asserting that prison officials "have made efforts to do so, to the greatest extent possible" (J.A. 17). [2]

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[1] The defendants named in the complaint were sued in their official and individual capacities (*see* J.A. 14), although the case is now proceeding against petitioners solely in their official capacities. Since the case began, four of the named defendants have been succeeded in office as follows: State prison director George W. Sumner by Ronald N. Angelone; warden H.L. Whitley by John V. Ignacio; associate warden Pat Anderson by Donald L. Helling; and store manager John Nye by Charles Horn. *See* Sup. Ct. R. 35.3. Carol Ployhar remains a unit counselor at Nevada State Prison. The complaint also named as defendants two cigarette manufacturers and a distributor of cigarettes sold in the prison, who were not served and thus were not parties to the suit (J.A. 3-4; Appendix to Petition for Certiorari ("Pet. App.") C43 n.1).

[2] To support a claim that the State acted reasonably, both the State and the United States, as *amicus curiae*, rely on an affidavit from Donald Helling (J.A. 21-24), but that affidavit was not part of the trial record. *See* Brief for Petitioners ("Pet. Br.") at 39-40; Brief for the United States ("U.S. Br.") at 3-4. The relevant background is as follows:

Shortly after the complaint was filed, Mr. McKinney moved for a preliminary injunction, Docket Entry ("D.E." 4), to which the State responded with the affidavit of Mr. Helling, who is now the lead petitioner in his capacity as associate warden of the Nevada State Prison. Mr. Helling's duties then included making inmate housing or "classification" decisions, and

In August 1987, Mr. McKinney asked the magistrate handling the case to subpoena an expert who could testify "on the effects cigarette smoking would have on a non-smoker housed in close confines with a heavy cigarette smoker." *See* Appendix to this brief ("App.") at 3a. The request was denied (App. 5a-7a). In May 1988, Mr. McKinney moved for the appointment of a court-appointed expert to testify about the health issues raised by the conditions of his confinement (App. 8a-10a). He stated that he had contacted an environmental toxicologist on the faculty at the University of Nevada School of Medicine in Reno, where the case would be tried, but that expert was unwilling to testify without being paid, and Mr. McKinney, who was proceeding *in forma pauperis*, lacked the resources to pay him (App. 8a-9a). The magistrate denied the motion, reasoning that an expert may be appointed for compensation only under Rule 706, Fed. R. Evid., but that Rule 706 envisions the appointment of an impartial expert, not one who would testify for one side or the other (App. 11a-13a).

Thereafter, the State moved for summary judgment, but its motion was denied. The magistrate explained that Mr. McKinney's allegations of harm based on proximity to a heavy smoker raised disputed issues of material fact which had to be examined under the "deliberate indifference" standard enunciated by this

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his affidavit asserted that an inmate's "personal desires" are taken into account in the housing classification process "insofar as practical" (J.A. 22), but that a ban on placing Mr. McKinney in a wing of the prison which houses smoking inmates would be unduly burdensome (J.A. 23).

In reply, Mr. McKinney disputed these claims (D.E. 12), but his preliminary injunction motion was not resolved because the magistrate entered an order consolidating the hearing on that motion with the trial on the merits (D.E. 13; J.A. 26). Mr. Helling's affidavit was also cited in support of the State's summary judgment motion, which was denied (J.A. 32-35, 46). Mr. Helling was scheduled to testify for the defense at trial (J.A. 61), and thus his affidavit was not offered as a defense exhibit (*see* J.A. 58). Because a judgment was directed in the State's favor before any of its witnesses testified, Mr. Helling's testimony did not become part of the trial record upon which the magistrate based her decision (*see* J.A. 66-73). Thus, the Helling affidavit is, at most, an indication of what Mr. Helling might say if he were to testify in any proceedings on remand, but the State errs in citing his affidavit as if it were a properly admitted part of the trial record. *Cf.* Sup. Ct. R. 24.6.

Court in cases such as *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Rhodes v. Chapman*, 452 U.S. 337 (1981)(J.A. 40-42, 46).

The parties then prepared a pretrial order which stipulated that approximately two-thirds of the inmates at Nevada State Prison smoke (J.A. 50) and further, as Mr. McKinney charged in his complaint, that there are "no restrictions on smoking in the prison's housing units, classrooms or law library," with smoking banned only in the infirmary and dining area (J.A. 51). The parties were, however, unable to agree on such questions as the degree of Mr. McKinney's exposure to tobacco smoke and the effects of that exposure on his health (J.A. 51-52).

A trial was conducted before the magistrate and a jury on 3 October 1989. Mr. McKinney testified on his own behalf, along with two former cellmates and two other inmates at Nevada State Prison. The inmate witnesses were heavy smokers who were called to corroborate the claims in Mr. McKinney's complaint about how secondary cigarette smoke had affected him (J.A. 68-70).[3] Most of the proposed exhibits were admitted into evidence, and they dealt with Mr. McKinney's requests for transfers, complaints about other conditions at Nevada State Prison and similar matters relating to the conditions of his confinement there, as well as his current medical symptoms and their treatment (J.A. 68-70). [4]

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[3] The magistrate did not let Mr. McKinney order a trial transcript at state expense (Pet. App. C40-C41), and thus the exact content of the testimony is not available. Mr. McKinney's pretrial brief proffered that these witnesses would testify that they smoked heavily in his presence, that he complained about his exposure to tobacco smoke, that he never smoked, and that he suffered from the health problems set out in his complaint (D.E. 34).

[4] The magistrate admitted 12 of Mr. McKinney's 13 marked exhibits, rejecting only a set of interrogatories (J.A. 69; Pl. Ex. 3). The minutes indicate that the State's exhibits were admitted, except for Exhibit F (J.A. 70), which the State's brief nonetheless cites (at 35) in an effort to show that Mr. McKinney declined a move to another cell three months after this case was filed, based on his difficulties getting along with other black inmates. The trial transcript is not available, but we understand that Mr. McKinney did not move was based on a failure to get along with members of a prison gang, one of whom was his proposed cellmate. Along the same line, the State suggests (at 37) that something is amiss because Mr. McKinney once complained that

Following the live testimony, Mr. McKinney sought to introduce an additional, 14th exhibit, described as "medical literature, copies of publications, advertisements, etc." (J.A. 71), some of which dealt with the long-term health effects of smoking. The magistrate took the request under advisement, along with the State's motion for a directed verdict (J.A. 71).

When court convened the next day, the magistrate denied Mr. McKinney's motion to introduce his Exhibit 14, dealing with long-term medical effects of smoking, and she also granted the State's motion for a directed verdict (J.A. 72-73). In a written decision, the magistrate explained that she viewed Mr. McKinney's complaint as stating two legal claims: (1) deliberate indifference by the State to his current medical needs, and (2) a constitutional right to have the State house him in a smoke-free environment (Pet. App. D2-D3).

The magistrate acknowledged that the Eighth Amendment bars the State from being deliberately indifferent to Mr. McKinney's medical needs, but she found no evidence of a serious, existing need which was not receiving care. She noted his testimony that he had been subject to certain "cold symptoms," such as nosebleeds, sore throats and watery eyes, but found no proof that cigarette smoke had brought about these conditions (Pet. App. D7). The magistrate noted also that Mr. McKinney had been examined for these symptoms by the prison medical staff, which found "nothing wrong with him that could be treated" (Pet. App. D8). She added that there was no expert or medical testimony showing that any of the petitioners had proximately caused any present injuries, and she cited a lack of proof that exposure to ETS could cause the various symptoms of which McKinney complained (Pet. App. D8-D10).

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several cartons of cigarettes were missing from his cell; that too was explained at trial by the fact that cigarettes are a form of currency in Nevada State Prison, where cash transactions are forbidden. Indeed, we understand that cigarettes were once distributed at no cost to inmates at Nevada State Prison, a practice once followed in the federal prison system, where some inmates received free cigarettes as a means of "institutional management and control and to prevent the development of extortionate practices in connection with the sale of cigarettes to inmates." U.S. Br. at 23 n.19.

Mr. McKinney's second claim was also found to be meritless. At the close of Mr. McKinney's case, before the State had presented any witnesses, the magistrate dismissed this claim as a matter of law. She held that Mr. McKinney had no legal right to be free from cigarette smoke while serving in prison, even though she declined to appoint an expert witness and excluded evidence on the risks of ETS, allowing only evidence on Mr. McKinney's current medical symptoms (Pet. App. D3-D5, C4-C5).

2. Proceedings in the Court of Appeals.

Mr. McKinney appealed to the United States Court of Appeals for the Ninth Circuit, which on 1 February 1991 affirmed in part and reversed in part. In a unanimous ruling, the court reversed the magistrate's dismissal of Mr. McKinney's second claim, holding that she erred in framing that issue in "all-or-nothing terms," inasmuch as this approach "excluded a valid eighth amendment claim lying between these two extremes: that compelled exposure to levels of ETS that pose an unreasonable risk of harm to human health constitutes cruel and unusual punishment" (Pet. App. C5). Thus, the court ruled that a "reasonable factfinder could conclude that the adverse health effects associated with ETS exposure would be especially severe for McKinney" (Pet. App. C20).

In holding that the Eighth Amendment may be violated if prisoners are exposed to an "unreasonable" risk to their health, the court of appeals cited scientific evidence, including a 1986 Surgeon General's report which stated that "a clear judgment can now be made: exposure to ETS is a cause of lung cancer. The data in this Report establish that a substantial number of the lung cancer deaths that occur among nonsmokers can be attributed to involuntary smoking" (Pet. App. C17). The Report added that the scientific case against involuntary smoking "is more than sufficient to justify appropriate remedial action, and the goal of any remedial action must be to protect the nonsmoker from environmental tobacco smoke" (Pet. App. C18). The court also cited a 1990 draft report by the Environmental Protection Agency which estimated that some 3800 deaths each year among non-smokers in the United States could be attributed to ETS, which EPA classifies as a Group A

(known human) carcinogen, along with such substances as arsenic, asbestos, benzene, chromium compounds and vinyl chloride (Pet. App. C18-C19). *See* EPA, Guidelines for Carcinogen Risk Assessment, 51 Fed. Reg. 33,992, 33,999-400 (1986).

In assessing the evolving standards of decency in this area, as required by Eighth Amendment jurisprudence, the court of appeals noted the existence of widespread bans on smoking in public places and confined areas, including, as of 1987, statutes limiting such smoking in 45 states and the District of Columbia, as well as a federal law banning smoking on most domestic airline flights (Pet. App. C26-C27). It further noted: (1) The federal prison system had adopted rules designed to protect non-smokers; (2) The American Jailers Association, representing 6500 jail administrators, had backed a ban on smoking in prisons; and (3) County and state corrections departments in 13 states had either banned or were considering a ban on cigarette smoking in prison as of May 1990 (Pet. App. C27-C29).

The court of appeals thus concluded that Mr. McKinney had stated a claim for injunctive relief and that he "should be allowed to present evidence regarding the level and degree of his exposure to ETS and whether that degree of exposure is sufficient to create an unreasonable risk of harm to his health" (Pet. App. C30). Citing a lack of evidence upon which to base any conclusions about whether these conditions actually posed an unreasonable risk of harm to McKinney's health, the court remanded the case to the district court for factfinding on these issues (Pet. App. C47 n.29).

The court of appeals also decided several issues not raised by the petition, and some of them may be relevant to the Court's consideration of the question presented here. Thus, it reversed the magistrate's ruling that she lacked the authority under Rule 706, Fed. R. Evid., to appoint an expert to testify, at State expense, on smoking and health issues at Nevada State Prison, and the court recommended that such an expert be appointed to testify on remand (Pet. App. C35-C38). The court also upheld the directed verdict in the State's favor as to Mr. McKinney's first claim regarding his current medical symptoms (Pet. App. C38-C40) and found that the named defendants

enjoyed qualified immunity from Mr. McKinney's damages claim (Pet. App. C31). The court added that the magistrate should consider appointing an attorney to represent Mr. McKinney on remand (Pet. App. C30; *see also* Pet. App. A7).

3. Proceedings in This Court and on Remand.

Several weeks after the Ninth Circuit ruled, Mr. McKinney was transferred from the Nevada State Prison in Carson City to the new Ely State Prison in Ely, Nevada, for reasons unrelated to this case, and he is now housed in a single cell in Ely. Despite this transfer, the State sought review in this Court, raising two issues: the Eighth Amendment claim at issue here and the ruling that an expert can be appointed under Rule 706, Fed. R. Evid., at state expense, to testify during any proceedings on remand. *Helling v. McKinney*, No. 91-269 (O.T. 1991). On 15 October 1991 this Court granted the petition, vacated the judgment and remanded the case to the court of appeals for further consideration in light of the intervening decision in *Wilson v. Seiter*, 111 S. Ct. 2321 (1991). *Helling v. McKinney*, 112 S. Ct. 291 (1991), *as amended*, *id.* at 963 (1992)(Pet. App. B1-B2).

Wilson clarified that an Eighth Amendment challenge to prison conditions consists of two parts: an objective component, which asks if the injury complained of is "sufficiently serious" to warrant constitutional protection, and a subjective component, which asks if prison officials acted with a "sufficiently culpable state of mind." *Id.* at 2324. *Wilson* stated that the subjective element is met in prison condition cases if the prisoner can meet the standard used in cases alleging a failure to address "serious medical needs," *i.e.*, "deliberate indifference" to the prisoner's condition. *Id.* at 2323, 2326.

On remand, the court of appeals received supplemental briefs, and on 27 March 1992 it issued an order reinstating its previous judgment, finding that *Wilson* did "not vitiate our determination of what satisfies the objective component" of Mr. McKinney's claim (Pet. App. A5). The court did, however, modify its earlier opinion in light of *Wilson* to state that while "hous[ing] a prisoner in an environment that exposes him to levels of ETS that pose an unreasonable risk of harming his health constitutes the objective component" of an Eighth

Amendment claim (Pet. App. A5-A6), a prisoner must also satisfy the subjective component in order to prevail. The case was thus remanded to the district court "for further proceedings consistent with this court's previous opinion" and with *Wilson* (Pet. App. A7).

4. Developments After Remand.

While this case was pending on remand in the court of appeals, there was a factual development which relates to the conditions of Mr. McKinney's present confinement in Ely and to any future confinement at Carson City.

On 10 January 1992 (the same day that supplemental briefs were filed in the court of appeals), petitioner Ron Angelone, the Nevada director of prisons, issued a smoking policy covering all Nevada prisons (App. 1a-2a). Under it, smoking is to be restricted to designated smoking areas in all classrooms, libraries, gymnasia, chapels, dining areas and infirmaries, as well as other areas in Nevada prisons (App. 1a).

The policy further stated that smoking by inmates or staff would be "strictly prohibited" during meetings and individual inmate counseling or treatment sessions (App. 1a). In addition, and "[c]ontingent upon space availability," wardens may "designate non-smoking sections in inmate dormitory settings," and "[r]easonable efforts may be made . . . to accommodate non-smokers in double bunked housing areas. Non-smoking inmates who wish to be housed with another non-smoking inmate are to provide a written request" to the proper official. The memorandum concluded: "As with any incompatible inmate living situation, accommodations will be made as necessary, consistent with security considerations and space availability" (App. 2a). The State did not advise the court of appeals or Mr. McKinney's counsel of this policy, nor was it mentioned in either the current certiorari petition (which this time raised only the Eighth Amendment issue) or the State's opening brief.

SUMMARY OF ARGUMENT

1. The adoption of a smoking policy in the Nevada state prison system may alter the complexion of this case in a way that renders a ruling on the merits unnecessary and inadvisable. Accordingly, we suggest that the Court may wish to consider

dismissing the writ or ordering the case remanded to the trial court for consideration of whether this development renders the case moot.

The court of appeals allowed Mr. McKinney to seek injunctive relief based on the effects of his exposure to smoke at Nevada State Prison at Carson City. Although he was subsequently transferred to another prison, where he is housed in a single cell, he was temporarily returned to Carson City on three occasions. There is no evidence in the record on whether the conditions of his temporary confinements at Carson City or any future stays there will eliminate the need for injunctive relief. Accordingly, those issues and others which relate to the changes resulting from this new smoking policy can best be resolved by the magistrate on remand.

2. The issue on the merits is whether a complaint of compelled exposure to secondary cigarette smoke, at levels posing an unreasonable risk of harm to an inmate's health, can state a claim for relief as a violation of the objective component of the Eighth Amendment, even though the inmate may not yet be suffering an ailment that can be traced to such exposure. Questions of subjective culpability, which must also be considered before an Eighth Amendment violation can be found, are not before this Court, but were left for resolution by the magistrate.

The court of appeals' "unreasonable risk" of harm standard in the context of compelled exposure to ETS is recognized under and consistent with this Court's cases which have stated that when a state takes persons into custody and holds them against their will, the Constitution imposes a corresponding duty to assume some responsibility for their safety and well-being. *See DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 199-200 (1989); *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982).

The State appears to concede that an Eighth Amendment claim would be stated if Mr. McKinney were presently suffering from a condition that is exacerbated by exposure to cigarette smoke. In denying the existence of any claim for relief here, however, the State takes the view that the Eighth Amendment protects against only those hazards which are immediately

harmful to a prisoner's health or well-being, while offering no protection against exposure to latent or potential hazards, no matter how injurious that exposure may turn out to be. That approach is inconsistent with the rulings of this Court.

Thus, in *Hutto v. Finney*, 437 U.S. 678 (1978), prisoners were able to challenge their exposure to the risk of contracting infectious diseases, although there was apparently no claim that any prisoner had actually done so. And in *Rhodes v. Chapman*, 452 U.S. 337 (1981), the Court cited with approval a number of cases which held that one need not wait to be physically injured in order to obtain relief. Consistent with these principles, the federal appeals courts have recognized that an objective violation of the Eighth Amendment can occur based on conditions such as inadequate fire protections, threats of physical assault, poor lighting, lack of exercise, exposure to the risk of AIDS, as well as exposure to asbestos, pesticides or a carcinogen with a long latency period. Whether a prisoner can actually prevail on such a claim is not the issue; what is clear is that the risk of serious injury in these situations states a claim for relief under the Eighth Amendment.

The State's brief focuses solely on this legal issue without addressing, much less trying to rebut, the scientific and other authorities which the court of appeals cited to buttress its conclusion that compelled exposure to ETS could produce latent injuries which are serious enough to warrant protection under the Eighth Amendment. If anything, the weight of scientific knowledge about the hazards of ETS has grown since the time of the court of appeals' ruling, thus confirming the soundness of that decision.

In making this point, however, it is important to stress that the court of appeals was discussing scientific and other evidence of the sort which *might* be introduced at a trial in this case. The court was not engaging in a discussion of evidence in the *present* record because there is none. The magistrate dismissed Mr. McKinney's claim as a matter of law without taking any testimony on the latent hazards of ETS exposure. Thus, in practical terms, the case comes before this Court as if Mr. McKinney's claim had been dismissed on the pleadings for failure to state a claim. Under these circumstances, dismissal

can be upheld only if there is no set of facts under which he might have a claim for relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), which is plainly not the case here.

ARGUMENT

I. THE ADOPTION OF A SMOKING POLICY IN THE NEVADA STATE PRISON SYSTEM MAY RENDER A RULING ON THE MERITS UNNECESSARY AND INAPPROPRIATE.

Before explaining why the judgment below rests on a solid legal footing and should be affirmed, we believe that it is appropriate to discuss briefly the relevance of the factual developments which occurred since the court of appeals first held that Mr. McKinney is entitled to seek injunctive relief regarding the conditions of his confinement at Nevada State Prison in Carson City.

In February 1991, Mr. McKinney was moved from Carson City to Ely, where he is now housed in a single cell. We cited his transfer as a reason for denying review in our brief in opposition (at 5-6); the State responded in its reply brief (at 10) that Mr. McKinney may be transferred back to Carson City, thus suggesting that there was a reasonable chance that Mr. McKinney would again be exposed to the conditions which gave rise to this suit.

The validity of that premise is open to question, however, in light of the State's recent promulgation of a smoking policy aimed at all State prisons. This development was known to the State before the Ninth Circuit issued its second ruling in this case and before the present certiorari petition was filed, answered and granted. Nonetheless, the existence of this new policy was not disclosed to Mr. McKinney, his counsel or the Court until the Solicitor General filed a brief on the merits as an *amicus curiae* in support of the State.

Under the circumstances, we respectfully suggest that the Court may wish to consider dismissing the writ as improvidently granted, *see Sanks v. Georgia*, 401 U.S. 144 (1971), or ordering the case remanded to the trial court for consideration of whether this development may render the case moot. We

recognize that Rule 15.4 does not permit the filing of motions to dismiss a petition and that questions of dismissal lie exclusively within the Court's discretion. *See* R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* § 5.15 (6th ed. 1986). Nonetheless, we believe the suggestion is warranted at this time. The new policy was known to the State when the petition was filed and had we been apprised of this change, we could have addressed it in our brief in opposition. *See Board of License Commissioners of Tiverton v. Pastore*, 469 U.S. 238 (1985).

Dismissal of the petition would make sense here, as it would allow the magistrate to consider in the first instance the effect of this new policy on Mr. McKinney's claim for injunctive relief. Moreover, the record is at best ambiguous with respect to exactly what the present conditions are at Carson City and how they are likely to affect Mr. McKinney. Those conditions may be relevant because, since the time he was transferred to Ely nearly two years ago, Mr. McKinney has been temporarily housed at Carson City on three occasions, for at least three weeks each time, in order to attend court proceedings in Reno, where he has other suits pending against Nevada prison officials. We are advised that he was placed in a "closed custody" cell during the first two stays, where he did not have a cellmate, and was not housed as part of the general inmate population. On the third stay, he was placed in the general population, where he was housed in a cell with a smoker who was asked not to smoke and who complied with that request for the two days they shared a cell. During his last stay at Carson City, he noticed that people no longer smoked in the prison library, but went outside to do so. He was not aware, however, that a new policy was in effect and did not otherwise notice any changes indicating that a policy change had taken effect. Mr. McKinney anticipates that he will return to Carson City on several occasions over the next year or so in connection with other litigation he has pending in Reno. [5]

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[5] Although this suit challenges only conditions at Carson City, Mr. McKinney contends that he was never advised that the new policy was being implemented at Ely and claims that it is not being enforced there.

In considering mootness issues, this Court has emphasized that Article III of the Constitution requires a "specific live grievance" at all times between the litigants, not merely an "abstract disagreement" over the constitutionality of a particular policy. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 479 (1990)(internal citations omitted). It is unclear whether the present case meets that test. On the one hand, the State declines to rule out a permanent transfer back to Carson City, and its reply brief at the petition stage seems to suggest (at 10) that inmate housing classifications present a chronic problem to prison administrators, thus implying that this is not a case where a request for injunctive relief has been rendered moot by cessation of the challenged policy and a lack of any "reasonable expectation" that the complaining plaintiff will ever be subjected to that policy again. *See id.* at 481 and authorities cited therein. *See also Honig v. Doe*, 484 U.S. 305, 318-19 & n.6 (1988). On the other hand, Mr. McKinney has been returned to Carson City three times; twice in a cell by himself and once in a cell with an inmate who refrained from smoking, although his isolation from the general population during the first two instances makes it difficult to generalize about how he will be treated if and when he is temporarily returned there in the future and about whether the smoking policy is, in fact, being enforced there.

Because of these ambiguities, which the magistrate is best situated to resolve, we submit that it is not possible for this Court to determine if the case is moot on the present record. The State does not address this issue in its brief, and the Solicitor General, who first brought the new smoking policy to the Court's attention, acknowledges that the case has a "decidedly abstract quality," U.S. Br. at 12, but does not argue that the new policy renders the case moot. His position thus appears to be that the possibility of a permanent move back to Carson City has kept the controversy alive, or else that it is preserved under the "capable of repetition, yet evading review" exception to the mootness doctrine. *See Lewis v. Continental Bank Corp.*, *supra*, 494 U.S. at 481.

For these reasons, and because there has been no factual development of the legal theory recognized by the court of appeals or on subjective culpability issues, we respectfully

suggest that the Court may want to dismiss the writ and allow the trial court to determine the precise dimensions of this controversy in light of the State's smoking policy and other developments. Should the Court decide to reach the merits, however, we now explain why the judgment of the court of appeals was correct and should therefore be affirmed.

II. MR. McKINNEY HAS STATED A CLAIM FOR RELIEF UNDER THE EIGHTH AMENDMENT.

A. Introduction.

At the outset, we believe it is useful to highlight precisely what the lower courts did and did not decide in this case, inasmuch as some of the State's arguments may obscure the precise contours of the Eighth Amendment issue presented for review.

The magistrate viewed Mr. McKinney's complaint as stating two claims: (1) deliberate indifference to the cold-like symptoms of which Mr. McKinney then complained and (2) a broader right to be housed in a smoke-free environment. The trial focused solely on the first issue, and the magistrate decided, based on testimony from Mr. McKinney and other inmates, that his present medical symptoms had been adequately treated by a prison doctor. The court of appeals affirmed, and that claim is no longer a part of the case.

As for the second claim, the magistrate found no "constitutional right for an inmate to be free from exposure to cigarette smoke," at least where the prisoner is not presently suffering from a disease associated with or exacerbated by exposure to ETS, *e.g.*, emphysema (Pet. App. D5). She reached that conclusion as a matter of law, without hearing any expert or other testimony about the potential health hazards of exposure to secondary cigarette smoke. Nor did she receive any evidence relating to what, after *Wilson v. Seiter*, is regarded as the subjective component of an Eighth Amendment violation, as her order denying summary judgment to the State indicated that the factual dispute to be resolved at trial involved the nature of Mr. McKinney's medical condition and what the State had done about it (J.A. 41-42). Thus, the magistrate's ruling on this

second claim is the equivalent of a dismissal for failure to state a claim under Rule 12(b)(6), Fed. R. Civ. P., on the objective element of an Eighth Amendment violation.

The court of appeals, viewing Mr. McKinney's filings with the deference usually accorded *pro se* litigants, *see Hughes v. Rowe*, 449 U.S. 5, 12-13 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), read the second claim as embracing a more focused cause of action, namely, "that compelled exposure to levels of ETS that pose an unreasonable risk of harm to human health constitutes cruel and unusual punishment" (Pet. App. C5). Since the magistrate did not consider evidence which might indicate whether conditions at Carson City might pose such a risk to Mr. McKinney, the court of appeals remanded to let the parties litigate that issue (Pet. App. C30, C47 n.29). And when *Wilson v. Seiter* subsequently clarified that subjective culpability must also be considered — a matter not expressly considered at trial in light of the magistrate's view that the case turned on Mr. McKinney's present medical condition (*see* J.A. 41-42) — the court of appeals explicitly directed that this issue be addressed as well (Pet. App. A1-A7).

Thus, the only question presented here is whether, as a matter of law, a claim of "compelled exposure to levels of ETS that pose an unreasonable risk of harm to human health" is cognizable as a violation of the objective component of the Eighth Amendment when the prisoner making the claim is not, at the time of the complaint, suffering from any malady which is exacerbated by such exposure. This point is crucial because the State's brief makes some assertions about what happened at earlier stages of this suit that do not accurately convey what was and was not litigated.

The State argues that the court of appeals erred in remanding this case for consideration of subjective culpability issues because, in the State's view, those issues were fully presented at trial and were resolved in the State's favor. Pet. Br. at 32-41. This contention misconstrues the record, and indeed, both of the State's *amici* seem to agree that the objective element is the only issue presented here. *See* U.S. Br. at 25 (the magistrate "did not separately consider the subjective component in the context of the broader Eighth Amendment principle the court

of appeals recognized"); Brief for State of Hawaii *et al.* ("Hawaii Br.") at 8 (even assuming deliberate indifference to ETS risks can be shown, objective component not met here).

The State's error appears to stem from a failure to distinguish Mr. McKinney's unsuccessful claim regarding his then-current medical condition from his claim regarding the future effects of ETS exposure. The magistrate's finding of no deliberate indifference on the former claim was based on evidence which addressed the conditions Mr. McKinney was then experiencing and the State's response to them. Her conclusions with respect to that evidence deals with *present* injury and cannot be stretched into a finding of no deliberate indifference to any *future* effects of ETS exposure, especially when no separate evidence was heard on that claim. In addition, the State fails to acknowledge that the magistrate decided this case prior to *Wilson v. Seiter*, apparently believing that the sole focus of both claims was the severity of Mr. McKinney's present ailments, which is an objective inquiry. *See* J.A. 38-42. Thus, the magistrate did not make a factual determination as to subjective culpability which precludes Mr. McKinney's right to litigate the claim of future effects which was recognized by the court of appeals. [6]

Moreover, apart from issues of subjective culpability, the State makes the separate argument that the court of appeals erred in adopting the objective "unreasonable risk" standard at issue here. The State contends that this "unreasonable risk" standard is excluded from the case by a pretrial order prepared by Mr. McKinney and a deputy attorney state which supposedly

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[6] Before leaving the topic of subjective culpability, we answer the Solicitor General's point that if this Court is not inclined to reverse the court of appeals outright, it should order a remand to let the magistrate "consider in the first instance the subjective component of the broader Eighth Amendment claim." U.S. Br. at 25. But that is precisely the inquiry which the court of appeals mandated (Pet. App. A6), and it is odd to suggest that the judgment under review should be vacated to let the magistrate decide an issue which the judgment already requires her to address. And to the extent that the State argues that the Donald Helling affidavit shows that subjective culpability was, in fact, litigated before the magistrate, suffice it to say that the affidavit is not a part of the trial record and thus not properly considered here. *See* note 2, *supra*.

indicates that Mr. McKinney's entitlement to a totally smoke-free environment was the only issue presented. The error was compounded, the State argues, because the only issue briefed on appeal was the correctness of the magistrate's decision to grant a directed verdict; thus the court of appeals' decision to formulate its "unreasonable risk" standard and its remand order requiring consideration of evidence in light of that standard are said to go beyond the scope of the issues which were presented for review. Pet. Br. at 46-49. We respond to each point in turn.

First, the pretrial order merely set forth a series of broadly-written factual and legal questions to be resolved at trial, without in any way suggesting that Mr. McKinney was interested only in a smoke-free prison environment and had abandoned any request for less sweeping relief (J.A. 52-53). Indeed, if the State were to prevail on this claim, it would profit very little, inasmuch as Mr. McKinney or another prisoner would be free to file a new complaint which pleads the more narrow cause of action recognized by the court of appeals. Second, Mr. McKinney's framing of the issue on appeal as whether the directed verdict was properly entered against him surely embraces the question of whether the magistrate correctly dismissed a cause of action relating to the future effects of ETS exposure simply because he was not presently suffering any readily apparent effects of that exposure.

In the final analysis, the State's real complaint seems to be that the court of appeals viewed Mr. McKinney's papers with the lenity normally granted to *pro se* litigants and found that it could not "say with assurance" that there is no set of facts which could be proven that would entitle Mr. McKinney to some relief. *Haines v. Kerner*, supra, 404 U.S. at 520-21. As we demonstrate in the rest of this argument, the court of appeals correctly synthesized applicable Eighth Amendment law in this area, and its decision to remand for further proceedings should be affirmed.

B. Applicable Eighth Amendment Standards.

The Eighth Amendment, which applies to the states under the Fourteenth Amendment's due process clause, *Robinson v. California*, 370 U.S. 660, 667 (1962), prohibits "cruel and

unusual punishments" from being inflicted on persons convicted of crimes. The Court "has not confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century,' but instead has interpreted the Amendment 'in a flexible and dynamic manner.'" *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989), *quoting Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (opinion of Stewart, Powell, Stevens, JJ.). Or, to use an oft-quoted formulation, the analysis is guided by "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958)(plurality opinion), *quoted in Stanford v. Kentucky*, *supra*, 492 U.S. at 369; *Ford v. Wainwright*, 477 U.S. 399, 406 (1986); *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989); *accord Hudson v. McMillian*, 112 S. Ct. 995, 1000 (1992)(objective component of an Eighth Amendment claim is "contextual and responsive to contemporary standards of decency")(internal quotation omitted).

Estelle v. Gamble held that the Eighth Amendment applies not only to punishments meted out in the form of a sentence, but also to any "'unnecessary and wanton infliction of pain'" which occurs during imprisonment and does not serve any penological purpose. 429 U.S. at 103, *quoting Gregg v. Georgia*, *supra*, 428 U.S. at 173. *See also Wilson v. Seiter*, *supra*, 111 S. Ct. at 2326-27; *Whitley v. Albers*, 475 U.S. 312, 319 (1986); *Ingraham v. Wright*, 430 U.S. 651, 670 (1977). Thus, under *Estelle* the Eighth Amendment bars "deliberate indifference" to a prisoner's "serious" medical needs, though it does not extend to a negligent or inadvertent failure to provide care. 429 U.S. at 105-06. The Eighth Amendment protections recognized in *Estelle* have been extended to the conditions in which prisoners are confined, and in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Court explained the reasoning behind the *Estelle* line of cases this way: "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.* at 199-200, *citing Youngberg v. Romeo*, 457 U.S. 307, 317 (1982). The reason for this rule is "simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him

unable to care for himself, and at the same time fails to provide for his basic human needs — *e.g.*, food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *Id.* at 200.

The Court has emphasized that an Eighth Amendment violation in the prison conditions context must consist of both a subjective and an objective component. The latter criterion looks to whether the alleged wrongdoing was objectively "harmful enough" to violate the standards of decency demanded by the Amendment, while the subjective element examines whether officials "act[ed] with a sufficiently culpable state of mind" to meet the *Estelle* "deliberate indifference" standard. *Wilson v. Seiter, supra*, 111 S. Ct. at 2326, 2329. *See also Hudson v. McMillian, supra*, 112 S. Ct. at 999.

As we indicated in part A, only the objective component of an Eighth Amendment claim is presented here. In order to answer the question "How harmful is 'harmful enough'?", the Court has used the "unnecessary and wanton infliction of pain" standard and "serious" medical needs analysis in *Estelle*. Thus, the objective prong of an Eighth Amendment violation is met by establishing a deprivation of "'the minimal civilized measure of life's necessities,'" not merely complaints of "routine discomfort," which are "'part of the penalty that criminal offenders pay for their offenses against society.'" *Hudson v. McMillian*, *supra*, 112 S. Ct. at 1000, *quoting Rhodes v. Chapman*, *supra*, 452 U.S. at 347.

In our view, the court of appeals correctly held that Mr. McKinney has stated a claim because he alleged a deprivation which is serious enough to be recognized under the objective standards of the Eighth Amendment. In arguing that this is not so, the State contends that exposure to a hazard cannot be a violation of the objective component of the Eighth Amendment if the most deleterious effects of that exposure, no matter how serious they may be, are not immediately apparent, but are latent. In Part C, we answer this point and explain why exposure to conditions where the hazards are latent are cognizable under the Eighth Amendment.

In part D, we discuss a matter which the State does not address in its brief, namely, the court of appeals' analysis of the scientific and other authorities which buttressed that court's view that a reasonable finder of fact might conclude that compelled exposure to ETS can indeed inflict serious and unnecessary pain on an inmate. In doing so, however, we add the caveat that the court of appeals (and this brief) are discussing evidence which might be introduced at any trial on this issue; no evidence is now in the record because the magistrate dismissed Mr. McKinney's complaint as a matter of law. Because the case comes before the Court in this posture, then, the judgment below may be reversed only if this Court should conclude, as a matter of law, that there are no conceivable conditions under which compelled exposure to tobacco smoke might rise above the level of "routine discomfort" that is part and parcel of prison life, and we respectfully submit that no such conclusion is possible in this case.

C. The Eighth Amendment Protects Prisoners From Exposure To Conditions Which Pose an Unreasonable Risk of Serious Harm, Including Harms Which Are Immediate and Those Which Are Latent.

At the outset, it may be useful to focus once again on what is and is not in dispute. The State and its *amici* seem to concede that if Mr. McKinney were presently suffering a serious medical problem as a result of exposure to secondary cigarette smoke, and if the State were being deliberately indifferent to his needs, then he would have stated a claim for relief under the Eighth Amendment. *See* Pet. Br. at 24-26; U.S. Br. at 13-14; Hawaii Br. at 14. The lower courts uniformly accept this proposition as well. *Hunt v. Reynolds*, No. 91-5711 (6th Cir. 10 September 1992); *Steading v. Thompson*, 941 F.2d 498, 500 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992); *Gorman v. Moody*, 710 F. Supp. 1256, 1262 (N.D. Ind. 1989); *West v. Wright*, 747 F. Supp. 329, 332 (E.D. Va. 1990); *Beeson v. Johnson*, 668 F. Supp. 498 (E.D.N.C. 1987). *Accord Franklin v. Oregon*, 662 F.2d 1337, 1346-47 (9th Cir. 1981)(allowing inmate with throat cancer to challenge placement with cigarette-smoking cellmate).

We are told, however, that this case is different because Mr. McKinney is not presently suffering any serious adverse consequences as a result of his exposure to tobacco smoke; therefore, no matter how dire the future consequences of any present or anticipated exposure may be, the "mere possibility" of such injury "does not entitle an inmate to elimination" of that health hazard. Pet. Br. at 43; *see also id.* at 18-19; Hawaii Br. at 8.

This argument relies heavily on a comment by the Tenth Circuit in another case involving a non-smoking prisoner to the effect that this Court has never "held that a potential, distant harm to a prisoner's health is a serious medical need," and thus the Eighth Amendment does not protect such a prisoner from exposure to secondary cigarette smoke. Pet. Br. at 21-22, *quoting Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992)(*in banc*). This argument is problematic for several reasons.

First, the argument, if accepted, would dramatically limit the scope of Eighth Amendment protections to those situations where a prisoner is exposed to a condition where death or serious injury is instantaneous (or nearly so). Under this formulation, the Eighth Amendment would not apply to situations where the prisoner is exposed to conditions which produce no immediate (or immediately apparent) injuries, even if it is a certainty (or at least a high probability) that the prisoner will die or endure a painful illness at some future time.

Indeed, if this were the law, then prison officials could decide to give every prisoner a flu shot with the same needle, even if some prisoners are HIV-positive and reusing a needle in this fashion could pass the HIV virus to other prisoners, thus assuring their deaths from an AIDS-related illness at some future point. According to the State, the Eighth Amendment imposes no obligation on prison officials to guard against such infection and requires only that they attend to a prisoner's "serious medical needs" once he actually contracts an AIDS-related illness. Or, to take a less dramatic example, this theory would permit prison officials to refuse to take any steps to protect prisoners from faulty electrical wiring, overloaded sockets, or other potential sources of a prison fire; under the

State's theory, they would be obliged to act only when a fire breaks out and only to evacuate and give adequate medical treatment to those injured in the blaze.

Second, the State's contention is also problematic because it flies in the face of this Court's statement in *DeShaney* that "reasonable safety" is one of the "basic human needs" which the Eighth Amendment protects. 489 U.S. at 200. Or, as the Court put it in *Youngberg v. Romeo*, *supra*, it is "cruel and unusual punishment to hold convicted criminals in unsafe conditions." 457 U.S. at 315-16. *Cf. Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)(noting in non-Eighth Amendment context the "obligation" of prison officials "to take reasonable measures to guarantee the safety of the inmates"). To be sure, the guarantee of "reasonable safety" in an Eighth Amendment context does not mean perfect safety (which cannot be guaranteed in any case), but only a level of safety which is sufficient to avoid the "unnecessary and wanton infliction of pain." But as this Court has recognized, the Eighth Amendment may entitle prisoners to an award of injunctive relief to protect them from conditions which are not presently causing "serious" injury, but which could do so in the future unless the harm is averted.

Thus, in *Hutto v. Finney, supra*, this Court upheld two lower court rulings that the conditions in the Arkansas penal system violated the Eighth and Fourteenth Amendments, particularly with respect to the confinement of prisoners together in a "punitive isolation cell." Some of these prisoners "suffered from infectious diseases such as hepatitis and venereal disease"; nonetheless, the mattresses were "removed and jumbled together each morning, then returned to the cells at random in the evening," when they were given to prisoners to spread out on the floor. 437 U.S. at 682-83. This was only one of several conditions which led the district court to find a violation of Eighth Amendment standards. This Court did not, however, hold that consideration of this factor was error, on the theory that the infectious diseases might be slow to spread or to manifest themselves among the affected prisoner population. Indeed, the Court noted that the district court had "ample authority . . . to address *each element* contributing to that violation." *Id.* at 687 (emphasis added).

In *Rhodes v. Chapman*, *supra*, the Court cited with approval several lower court decisions allowing prisoners to use the Eighth Amendment to obtain relief against conditions which threatened their personal safety. 452 U.S. at 352 n.17. One case was *Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), which stated that a prisoner "does not need to wait until he is actually assaulted before obtaining relief." This principle has been adopted in other circuits too, *see Woodhous v. Commonwealth of Virginia*, 487 F.2d 889, 890 (4th Cir. 1971); *Finney v. Arkansas Board of Correction*, 505 F.2d 194, 201 (8th Cir. 1974), which were cited for that proposition in another case *Rhodes* cited, namely, *Pugh v. Locke*, 406 F. Supp. 318, 329 (M.D. Ala. 1976), *aff'd as modified*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, 438 U.S. 781 (1978). Finally, in *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), the court found an Eighth Amendment violation based on threats to personal safety, such as exposed electrical wiring, inadequate firefighting equipment, and a practice of allowing inmates with "serious contagious diseases" to "mingle with the general prison population." *Id.* at 1300. *See also Morgan v. District of Columbia*, 824 F.2d 1049, 1057-58 (D.C. Cir. 1987)(constitutional right to be protected from unreasonable threat of violence), *cited in Wilson v. Seiter*, *supra*, 111 S. Ct. at 2327.

The federal appeals courts have recognized the availability of injunctive relief to prevent serious injuries in a variety of contexts. In *Purvis v. Ponte*, 929 F.2d 822, 825 (1st Cir. 1991), it was reiterated that a prisoner need not wait to be physically assaulted before being able to seek relief. *Accord Walsh v. Mellas*, 837 F.2d 789, 797-98 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988). In *Glick v. Henderson*, 855 F.2d 536 (8th Cir. 1988), the court stated that inmates would have an Eighth Amendment claim if they faced a "pervasive risk" of contracting the AIDS virus and if prison officials did not "reasonably respond to that risk." *Id.* at 539-40 (internal citation omitted). Inadequate fire safety precautions have also been recognized as a possible Eighth Amendment violation. *Hoptowit v. Spellman*, 753 F.2d 779, 783-84 (9th Cir. 1985); *Dimarzo v. Cahill*, 575 F.2d 15, 18 (1st Cir. 1978)(one-"need not wait for the conflagration before concluding that a real and present

threat exists")(footnote omitted); *Shrader v. White*, 761 F.2d 975, 978, 984-86 (4th Cir. 1985).

In other cases too, the appeals courts have recognized that a condition of confinement can rise to the level of an Eighth Amendment violation even if the adverse impact is not felt immediately. Thus, prisoners have been allowed to litigate claims of inadequate lighting, *Hoptowit v. Spellman*, *supra*, 753 F.2d at 783; *Bono v. Saxbe*, 620 F.2d 609, 617 n.12 (7th Cir. 1980), as well as lack of exercise, *Davenport v. DeRobertis*, 844 F.2d 1310, 1315-16 (7th Cir. 1988); *French v. Owens*, 777 F.2d 1250, 1255-56 (7th Cir. 1985). *See also Todaro v. Ward*, 565 F.2d 48, 51 (2d Cir. 1977) (duty to epileptic prisoner begins before inmate chokes on tongue).

This is consistent with *Hutto v. Finney*, which upheld an injunction barring prison officials from confining prisoners to the isolation cell for more than 30 days. In so doing, the Court recognized that some conditions found in a prison may be tolerable "for a few days," but would be "intolerably cruel [if continued] for weeks or months." 437 U.S. at 687. Another illustration is provided by *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979), cited with approval in *Wilson v. Seiter*, *supra*, 111 S. Ct. at 2327, which declined to hold that a lack of outdoor exercise was *per se* unconstitutional, but did hold that confinement indoors without exercise for four years was not permissible.

These cases thus indicate that certain conditions, which might be tolerable for a day, a week, a month or even longer without rising about the "routine discomfort" level, at some point, however, constitute a sufficiently serious deprivation which is recognized by the Eighth Amendment. In none of the cited cases was there any proof of immediate, actual harm, yet the courts routinely recognized that the Eighth Amendment was not limited to situations where serious injury is immediately felt, but protects as well against the risk of at least some serious future harms as well.

As we will develop in more detail in part D below, this point has considerable applicability here. Allowing a single puff of cigarette smoke to be inhaled by an otherwise healthy, nonsmoking prisoner would surely not be an Eighth Amendment

violation, but evidence of indifference to a constant exposure at levels that pose an unreasonable risk of serious injury would be another matter entirely. And that brings us to one final category of situations in which the appellate courts have recognized that an Eighth Amendment claim would lie, even though the serious health effects are latent or not otherwise immediate, namely, exposure to environmental hazards.

In *Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990), the court allowed a prisoner to bring an Eighth Amendment claim for injunctive relief based on his placement in a cell containing asbestos. The court saw the issue as indifference to a serious medical need and rejected the notion that the prisoner had to become seriously ill before he could sue. *Id.* at 1464. The fact that the "plaintiff was requesting preventive treatment in asking to be placed in an asbestos-free environment does not make his medical need not to breath[e] asbestos any less serious." *Id.* at 1464 n.10.

This approach makes considerable sense. Were the law otherwise — if prisoners who lived and worked in asbestos-lined surroundings could not seek preventive relief — they would be susceptible to diseases which do not manifest themselves immediately, but which could subject the prisoner to an "unnecessary and wanton infliction of pain." Asbestos is classified by the Environmental Protection Agency as a "Group A" (*i.e.*, known human) carcinogen, a classification which ETS will soon share. *See* pp. 6-7, *supra*, and pp. 32-34, *infra*. Exposure to asbestos is associated with asbestosis, a very painful lung disease, as well as mesothelioma, a form of lung cancer. These illnesses generally have latency periods of ten to 25 years from the date of initial contact, because asbestos fibers, once inhaled, remain in the lung, causing a tissue reaction that is slowly progressive and apparently irreversible. Even if no additional fibers are inhaled, tissue changes can continue undetected for decades. Moreover, the effect of asbestosis can be cumulative, as each exposure to asbestos dust can result in additional tissue changes. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973).

Similarly, in *Clark v. Taylor*, 710 F.2d 4 (1st Cir. 1983), a prisoner who was suspected of killing another prisoner had his

skin involuntarily treated with a chemical called benzidine, in an effort to detect traces of the victim's blood. An expert testified at trial that exposure to benzidine can increase one's risk of developing bladder cancer, although the latency period lasts 14 to 30 years. On that record, the court of appeals held that compelled exposure to this carcinogen violated Eighth Amendment standards and upheld an award of compensatory and punitive damages, despite what the State here would regard as a lack of present injury.

Finally, in *Johnson-El v. Schoemehl*, 878 F.2d 1043 (8th Cir. 1989), the court held that a Fourteenth Amendment claim would lie based on allegations by prisoners in a city jail that they were exposed to a twice-a-week spraying of pesticides and were given no masks or protective clothing, even though the sprayers were so attired. Once again, there was apparently no claim that this exposure caused the prisoners any present injury, but the court of appeals remanded for further factfinding. *Id.* at 1054-55.

The state of the law in this area, at least as it is reflected in the fairly uniform set of federal appellate rulings discussed here, was well summarized by the Third Circuit, which rejected a similar claim that the Eighth Amendment permits a challenge only to "actual health problems." As that court put it — and this responds to the State's citation of the Tenth Circuit opinion in *Clemmons v. Bohannon* — there is nothing in this Court's jurisprudence which suggests that certain conditions do not "fall below constitutional standards merely because there has not yet been an epidemic of typhoid fever, an outbreak of AIDS, a deadly fire, or a prison riot." *Tillery v. Owens*, 907 F.2d 418, 428 (1990).

We recognize, of course, that these lower court decisions are not binding on this Court, but we offer them for their persuasive qualities. Moreover, they are faithful to the statement in *DeShaney* identifying "reasonable safety" as a "basic human need" which the Eighth Amendment protects, as well as *Hutto* and *Rhodes*, which suggest that injunctive relief is available to secure reasonable safety even if one has not yet been assaulted, electrocuted, burned in a fire, or infected with a contagious disease.

We recognize too that not every complaint of possible future injury is enough to make out a violation of the Eighth Amendment's objective component. That is why we have argued throughout this discussion that the objective protections of the Eighth Amendment are held applicable only to unreasonable risks of serious harm. The concept of "serious" harm is taken from the "serious" medical needs standards adopted in *Estelle* and is designed to coincide with this Court's teachings that the Eighth Amendment covers only "basic human needs" and is not intended to be a shield against complaints of "routine discomfort." *Hudson v. McMillian*, *supra*, 112 S. Ct. at 1000. For the same reason, we suggest the coverage of only "unreasonable" risks, to distinguish them from purely conjectural or unrealistic possibilities.

Before leaving this point, we note that the Solicitor General does not go as far as the State or its state *amici* in seeking to limit the Eighth Amendment to cases of present injury. His brief agrees with us that *Hutto v. Finney* stands for the proposition that the Eighth Amendment "plainly bars prison officials from housing an inmate with others who have a serious and readily contagious disease, even though it has not yet been transmitted." U.S. Br. at 19. He also concedes the possibility of situations in which exposure to toxic or other substances "would present a risk of sufficient likelihood or magnitude — and in which there is a sufficiently broad consensus that exposure of *anyone* to the substance should therefore be prevented — that Eighth Amendment protections would be triggered, even though the effects of the exposure would not manifest themselves for some time." *Id.* (emphasis in original).

The Solicitor General nonetheless urges reversal on the theory that, however such a category of conditions may be defined, exposure to secondary cigarette smoke cannot reasonably be included in it, despite its "significan[ce] from a public health perspective." U.S. Br. at 16. The reason, we are told, is that the possibility of any one inmate suffering as a result of such exposure is too "speculative," and the circumstances of his exposure "may vary widely over time and among inmates." *Id.* If this argument is based on the proposition that there is no factual predicate to support Mr. McKinney's claim, then this case is not in a posture to let the

Court decide what the evidence shows because there has been no trial on that issue, and, in addition, as we explain in Part D, there is a substantial body of scientific support for Mr. McKinney's position.

But if the contention is based on an assumption that Mr. McKinney cannot seek relief because he is not now suffering from a illness associated with ETS exposure and may never contract any such illness in the future, the argument is wrong as a matter of law. Thus, although not everyone who is exposed to secondary cigarette smoke will contract lung cancer or heart disease, the same can be said of other hazards which the lower courts have explicitly recognized as falling within the ambit of possible Eighth Amendment protections. In the event of a prison fire, for example, some prisoners might die, while others might escape uninjured; some might suffer third degree burns, others only minor smoke inhalation. From the standpoint of any individual prisoner, the risk of injury during a prison fire is (to use the Solicitor General's formulation) "speculative," and the extent of inmate injuries may "vary widely." Nonetheless, the lower courts have routinely held that inadequate fire safety precautions fall within the purview of the Eighth Amendment. Similarly, while everyone who is exposed to asbestos does not automatically contract asbestosis or mesothelioma, the case law does not suggest that no claim will lie because some prisoners might escape the ravages of those diseases.

While the Solicitor General's argument may seem more appealing than the absolutist position taken by the State and the other *amici*, in practice, it would recognize an Eighth Amendment protection only in those cases where a prison population was exposed to universally lethal materials such as plutonium, while still allowing an "unnecessary and wanton infliction of pain" on inmates whose only fault is that they cannot predict with certainty that they will be the ones ultimately afflicted with a serious, perhaps fatal, disease as a result of their exposure to asbestos, pesticides, or other environmental or similar hazards. Such a result is inconsistent with the requirement in *DeShaney* and similar cases of "reasonable safety" for all prisoners.

In sum, then, we ask the Court to reaffirm what is implicit in its own rulings and explicit in the lower court rulings, namely, that exposure to a condition which poses an unreasonable risk of serious harm is cognizable under the Eighth Amendment's objective component, even if the complaining prisoner has not yet died or been stricken with a serious illness. [7]

D. A Prisoner's Complaint of Compelled Exposure To Secondary Cigarette Smoke At Levels Posing An Unreasonable Risk to His Health States a Claim For Relief Under the Eighth Amendment.

We turn now to the question of whether compelled exposure to secondary cigarette smoke can be said to pose the type of unreasonable risk that would allow a prisoner to challenge his exposure in the same way that the cited cases indicate that he can challenge an unreasonable risk of serious harm from exposure to contagious diseases, inadequate fire safety precautions and other hazardous situations. In analyzing this issue, it is crucial to recall the procedural posture of this case, specifically, the fact that the magistrate dismissed Mr. McKinney's claim as a matter of law without considering any evidence on this claim. Thus, dismissal of that claim can be upheld only if it can be said "beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

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[7] The Solicitor General and the state *amici* cite in passing *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), for the proposition that present (or at least imminent) "injury in fact" is required to have standing to sue under Article III. U.S. Br. at 18; Hawaii Br. at 6. To this we respond that the injury-in-fact is the present exposure to hazardous conditions, such as the 43 carcinogens which are contained in cigarette smoke and which a non-smoker may be forced to inhale (Pet. App. C14). A prisoner who inhales carcinogens through his nose, whether from asbestos fibers or tobacco smoke, has suffered a physical affront, no less than a prisoner who receives a punch in the nose. *See Hudson v. McMillian*, *supra*, 112 S. Ct. at 1001.

Also, the injury issue in *Lujan* arose at the summary judgment stage while here, the claim was, in effect, dismissed on the pleadings. The closer analogy would thus be to *Students Challenging Regulatory Agency Procedures v. United States*, 412 U.S. 669 (1973), where allegations of injury, even if attenuated, may survive dismissal, regardless of what the plaintiff can eventually prove on the merits.

The State did not attempt to make such a showing before the magistrate. The court of appeals cited various scientific authorities to buttress its conclusion that dismissal of an ETS exposure claim cannot be dismissed under *Conley*, but the State's brief does not respond to those points, preferring instead to rest its claim for reversal on the legal theory that the Eighth Amendment does not, as a matter of law, ever afford a prisoner any relief from compelled exposure to ETS, unless apparently the prisoner is presently complaining about the effects of emphysema or a similar condition which ETS exacerbates.

Thus, if the Court should agree with us that cases such as *Hutto v. Finney* and *Rhodes v. Chapman* do recognize the existence of an Eighth Amendment protection for serious, latent injuries, then the proper course is to affirm the judgment and let the parties resolve the dispute about the nature of the risks from ETS before the trial court. The court of appeals correctly recognized that, whatever the outcome may be on the merits, one should avoid reaching any conclusions on the basis of the pleadings alone. Rather, the parties should be allowed to develop a factual record before the magistrate, who is best equipped to sort out this highly factbound dispute in the first instance.

Even though the State does not cite any authorities to rebut the scientific authorities cited by the court of appeals, we note that the overwhelming weight of scientific evidence — including that developed since the court of appeals first ruled in this case — indicates that compelled exposure to ETS can be very hazardous indeed. In the discussion which follows we discuss some of that evidence, both to indicate that dismissal of Mr. McKinney's claim under *Conley*, or for that matter on a motion for summary judgment, would be unwarranted and to indicate the sort of showing that he could make on remand, particularly if an environmental toxicologist is able to offer expert testimony on his behalf. In addition, as we also demonstrate, societal attitudes have evolved to the point that compelled exposure to ETS is barred in many settings. We discuss each point in turn below.

1. *Current Scientific Evidence*. The State argues, apparently as a matter of law and without regard to what the facts may be,

that the level of pain or deprivation which might be caused by exposure to ETS is simply not sufficient to constitute a violation of the objective component of the Eighth Amendment. Pet. Br. at 26. In deciding that a reasonable factfinder might reach a contrary conclusion, the court of appeals cited various reports by federal agencies, including a 1986 Surgeon General's report which concluded that exposure to ETS is a cause of lung cancer and that acute and chronic respiratory diseases have been linked to ETS (Pet. App. C16-18). U.S. Dep't of Health and Human Services, Report of the Surgeon General, *The Health Consequences of Involuntary Smoking (1986)*("1986 Surgeon General Report"). The court also cited a 1990 draft report released by the Environmental Protection Agency which concluded that ETS is causally associated with lung cancer in non-smoking adults; that ETS should be classified as a Group A (known human) carcinogen according to EPA's guidelines for carcinogen risk assessment; and that approximately 3800 lung cancer deaths per year among non-smokers (both those who never smoked and those who formerly did) can be attributed to ETS (Pet. App. C18-C19). EPA, *Health Effects of Passive Smoking: Assessment of Lung Cancer and Respiratory Disorders in Children (External Review Draft), reported at* 55 Fed. Reg. 25,874 (1990).

Authorities of this sort are surely sufficient to warrant a conclusion that this case should not have been dismissed on the pleadings. If anything, the level of knowledge about the hazards associated with ETS has advanced considerably since the court of appeals rendered that decision. The 1990 EPA draft report has been superseded by a May 1992 draft, which again called for classifying ETS as a Group A carcinogen. The draft report found that it could say with confidence that ETS causes 3000 lung cancer deaths among non-smokers each year, and it associated ETS with a number of other respiratory problems. EPA, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders (Review Draft)* 1-4, 1-5 (May 1992). In July 1992, EPA's Scientific Advisory Board agreed with the conclusions, and the Administrator is expected to approve a slightly revised version of this report by year's end. "Secondhand Tobacco Smoke Is Called a Carcinogen by EPA Review Board," *The Wall Street Journal* A3 (23 July 1992).

To put these figures in context, it may be useful to compare a non-smoker's risk of death by lung cancer as a result of exposure to ETS with the risk of dying by cancer as a result of exposure to the other Class A carcinogens which EPA regulates as hazardous air pollutants, such as benzene, asbestos, or arsenic. A 1990 study by two government scientists included the following table, which compares the number of cancer deaths annually from ETS and other indoor and outdoor pollutants:

Comparison of Estimated Cancer Deaths (CDs) from Various Airborne Carcinogens in the U.S.

Indoor pollutants	
Environmental tobacco smoke (homes and workplaces)	5000 CDs/yr
Radon gas in homes (non-smokers only)	4000 CDs/yr
Outdoor pollutants	
Asbestos	15 CDs/yr
Vinyl chloride	< 27 CDs/yr
Airborne radionuclides	17 CDs/yr
Coke-oven emissions	< 15 CDs/yr
Benzene	< 8 CDs/yr
Arsenic	< 5 CDs/yr

Repace and Lowrey, "Risk Assessment Methodologies for Passive Smoking-Induced Lung Cancer," 10 *Risk Analysis*, No. 1, at 27, 35 Table II (1990) (footnote omitted). *See also* Repace, "Passive Smoking Is Risky," 44 *J. Am. Med. Women's Ass'n*, March/April 1989, 50, 53 (estimating 30 percent increase

in a non-smoking wife's risk of lung cancer death based on exposure to husband's cigarettes). [8]

Apart from this evidence about how ETS can cause lung cancer and other respiratory problems, recent evidence also shows that the link between ETS and heart disease can lead to many more excess deaths each year. A study published earlier this year in the *Journal of the American Medical Association* estimated, on the basis of current epidemiological data, that exposure to ETS accounts for 35,000 to 40,000 deaths from heart disease annually among people who never smoked and those who formerly smoked, which is roughly 12 to 13 times as many deaths as are associated with lung cancer among the same population. Steenland, "Passive Smoking and the Risk of Heart Disease," 267 *J. Am. Med. Ass'n* 94 (January 1992); *see* also Glantz and Parmley, "Passive Smoking and Heart Disease," 83 *Circulation*, January 1991, 1.

According to the *JAMA* study, an individual male never-smoker who lives with a current or former smoker is estimated to have a 30 percent higher risk of death by ischemic heart disease by the age of 74 than a male never-smoker who lives with a non-smoker and is exposed to what is referred to as "background" (*i.e.*, normal, day-to-day) exposure to ETS. *Id.* at 95, 98-99. To put the dimensions of this problem in starker terms, the study notes that EPA and the Food and Drug Administration regulate environmental limits for toxins if there is a one in 100,000 or one in 1,000,000 lifetime risk of an excess death based on exposure to a carcinogen. By contrast, the increased risks of death from ischemic heart disease based on exposure to ETS are as high as one to three per 100. *Id.* at 98.

Thus, the risks associated with ETS may be 10,000 times above the levels which prompt these federal regulatory agencies

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[8] Copies of these and other scientific papers cited in the brief are being lodged with the Clerk for the Court's convenience. The estimate of 5000 lung cancer deaths among non-smokers annually was based on data available at the time, whereas EPA now pegs the annual fatality rate at 3000. Even with that lower figure, however, the relative risks of ETS exposure to non-smokers are far greater than the *combined* total risks from all the listed carcinogenic outdoor air pollutants which EPA regulates under the Clear Air Act. Repace and Lowrey, *supra*, at 35.

to take remedial action against other carcinogens. If anything, the risks may be even higher in the prison setting of which Mr. McKinney complains both as a general proposition, because of the high percentage of prisoners who smoke, and also in his specific case, given his complaint about confinement in a cell with a five-pack-a-day smoker. The scientific studies identifying the degree of risk faced by a non-smoker living with a smoker implicitly posit that a non-smoker has options which are simply not available to a prisoner, *e.g.*, going to another room or outdoors to avoid ETS. Moreover, the average U.S. cigarette smoker smokes 32 cigarettes per day at a rate of two cigarettes per hour. Repace and Lowrey, *supra*, at 28. By contrast, Mr. McKinney's cellmate smoked five packs or 100 cigarettes a day at a rate of six cigarettes per hour, thus exposing Mr. McKinney to ETS at levels up to three times higher than he would face as a civilian, or as much as a nine in 100 risk of death from ischemic heart disease. *See* Steenland, *supra*, at 98.

Apart from these comparisons, the risk at issue here is also of a far greater magnitude than the risks that are regulated by the Occupational Safety and Health Administration, which is responsible for promulgating standards "which most adequately assure[], to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity." 29 U.S.C. § 655(b)(5). In construing that mandate, this Court has suggested that a risk of one excess cancer death per 1000 exposed workers might well be "significant" and should therefore, if feasible, be eliminated by regulation. *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 655 (1980). Applying that test, OSHA has imposed a number of standards to regulate strictly toxic substances that pose risks of far *lesser* magnitude than those at issue here. *See, e.g., International Union, United Auto Workers v. Pendergrass*, 878 F.2d 389, 393 (D.C. Cir. 1989)(estimates of residual cancer risk to workers from formaldehyde with OSHA standard in place ranged from .0056 to 2.64 per 1000 workers); *Building and Construction Trade Department, AFL-CIO v. Brock*, 838 F.2d 1258, 1265 (D.C. Cir. 1988)(residual risk of mesothelioma death from asbestos exposure on the order of 1.64 per 1000 workers found to be significant); *Public Citizen Health Research Group v. Tyson*, 796

F.2d 1479, 1502 (D.C. Cir. 1986)(residual cancer risks of 1.2 to 2.3 per 1000 workers from exposure to ethylene oxide found to be significant).

Neither the State nor the *amici* offer any evidence to rebut the scientific evidence which the court of appeals cited, nor do they take account of the more recent advances in knowledge about this issue. Indeed, the State simply ignores the issue of scientific evidence and is apparently content to rest its case on the proposition that, however deadly exposure to ETS may prove to be at some future point, the Eighth Amendment simply offers no protections.

For their part, the state *amici* acknowledge the 1986 Surgeon General's report, but nothing more recent. They claim, however, that this report is too "equivocal" or "cautious" to be of any value, citing various passages which indicate the need for better risk assessments and studies of the issue. Hawaii Br. at 10-11. Apart from the difficulty that this argument is one of fact, not of law, the *amici*'s highly selective reading (which makes no mention of the 1990 EPA draft report) is contradicted by the words of the Surgeon General elsewhere in that report. The Surgeon General categorically stated, citing an "abundance of evidence" that "a clear judgment can now be made: exposure to ETS is a cause of lung cancer." 1986 Surgeon General Report at 10. He also specifically responded to the claim that "more research is required," stating that it was his "judgment that the time for delay is past; measures to protect the public health are required now. The scientific case against involuntary smoking as a health risk is more than sufficient to justify appropriate remedial action." *Id.* at xii. *See* Pet. App. C17-C18. [9]

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[9] The 1986 Surgeon General report was a breakthrough in terms of the strength of its scientific conclusions. As the court of appeals noted (Pet. App. C15-C17), previous reports, issued in 1979, 1982 and 1984, found that tobacco smoke can be a significant source of indoor air pollution and can exceed EPA standards for exposure to carbon monoxide, but as late as 1982, no conclusive link between ETS and lung cancer had been shown. By 1984, however, the Surgeon General was able to detect differences in measures of pulmonary function between subjects who are chronically exposed to ETS and those who are not. *See* U.S. Dep't of Health, Education and Welfare, Report of the Surgeon General, *Smoking and Health* (1979); U.S. Dep't of Health and Human Services, Report of the Surgeon General, *The Health Consequences of Smoking: Cancer* (1982); U.S. Dep't of Health and Human Services, Report of the Surgeon General, *The Health Consequences of Smoking: Chronic Obstructive Lung Disease* (1984). Also in 1986 a report by the National Academy of Sciences' National Research Council concluded, as did the Surgeon General, that the scientific evidence, taken as a whole, showed a higher incidence of lung cancer among people exposed to ETS. *Environmental Tobacco Smoke: Measuring Exposures and Assessing Health Effects* 10. *See* Pet. App. C45-C46 n.14.

The Solicitor General takes a somewhat different tack, arguing that the Eighth Amendment cannot be read as covering only speculative injuries (a point we addressed above) and further, that the Amendment merely sets a floor and does not command, for example, that prison diets "conform to the latest medical evidence concerning what foods are best for long-term health." U.S. Br. at 19. Thus, he argues, scientific evidence of an increased risk of heart disease from eating certain foods would "not mean that it is cruel and unusual punishment for prison officials to serve macaroni and cheese instead of broiled fish." *Id.*

The problem with this formulation is that it is long on assertions and short on facts, since the record contains no evidence on the risks posed by either ETS or macaroni and cheese, either individually or on a comparative basis, and, we submit, the Court should not attempt to make a definitive scientific comparison on its own. In any event, the Solicitor General's argument badly misstates the issue presented here. Is he contending that the risks associated with an occasional dinner of macaroni and cheese are in the same league as the risks faced by non-smokers who are forced to live and work in a setting where two-thirds of all inmates smoke, where smoking is allowed in most places, and where one's cellmate in a six by eight foot room smokes five packs of cigarettes a day (or one every ten minutes, assuming eight hours of sleep)? Is he suggesting that the Food and Drug Administration regards macaroni and cheese as posing the same degree of risk as a Group A carcinogen? In the absence of any factual proof on this point, the comparison is apt only if one assumes that ETS has been proven to pose no greater risk to one's health than

does macaroni and cheese and that prisoners are exposed to a forced diet of macaroni and cheese (with no alternatives) to the same extent that non-smoking prisoners are exposed to ETS in the circumstances of which Mr. McKinney complained.[10]

Thus, whatever application the Eighth Amendment may have to other risks, the State's contentions do not apply here, where there is constant exposure to an ambient, airborne carcinogen and when the available evidence suggests that the risks of dying from heart disease or lung cancer as a result of compelled exposure to ETS far exceed the levels which our society will tolerate with respect to other airborne carcinogens. In making this point, we are not asking the Court to endorse the conclusions set forth in these studies; we present them only as an indication of the type of showing which Mr. McKinney would make if the case is remanded to district court and to show that there is substantial evidence that the risk posed by compelled exposure to ETS can constitute a violation of the objective component of the Eight Amendment. Differently put, in order to overturn the judgment below and rule for the State at this stage of the case, the Court must conclude that the Eighth Amendment affords no protection whatsoever against hazards which can be controlled by prison officials and threaten as many as three in every 100 inmates (maybe more) with the risk of dying an unnecessary and painful death.

2. *Current Societal Attitudes*. Apart from this scientific evidence, it is also appropriate to consider the condition which Mr. McKinney challenges in light of evolving societal attitudes. Such an inquiry is consistent with this Court's observation last Term that the objective component of an Eighth Amendment claim is "contextual and responsive to contemporary standards of decency," *Hudson v. McMillian*, *supra*, 112 S. Ct. at 1000

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[10] The Solicitor General does not, however, take the view that feeding prisoners a diet which is completely lacking in nutritional value, or which perhaps subjects them to the risk of diseases such as scurvy or rickets, would be permissible. *Cf. Hutto v. Finney, supra*, 437 U.S. at 683 & n.7 (a condition which contributed to the Eighth Amendment violation there was feeding prisoners less than 1000 calories a day, with meals consisting primarily of four-inch squares of "grue," a substance created by mashing meat, potatoes, oleo syrup, vegetables, eggs, seasoning it into a paste and baking it in a pan).

(internal quotation omitted), and *see* cases collected at p. 19, *supra*. "The clearest and most reliable objective evidence of contemporary values is the legislation enacted by this country's legislatures," *Penry v. Lynaugh*, *supra*, 492 U.S. at 331, and the focus is on the standards accepted by "modern American society as a whole." *Stanford v. Kentucky*, *supra*, 492 U.S. at 369 & n.1. *See also id.* at 371 (looking to "degree of national consensus" on a given issue); *accord Thompson v. Oklahoma*, 487 U.S. 815, 849 (1988)(O'Connor, J., concurring).

As the court of appeals noted, there are many legislative enactments reflecting the prevailing contemporary view in favor of limiting compelled exposure to ETS in a number of settings. These include a federal law which bans cigarette smoking on virtually every domestic flight, 49 U.S.C. App. § 1374(d)(1), which may be an apt comparison here, as airline passengers have no more freedom than prisoners to avoid unwanted cigarette smoke. Smoking is also forbidden on interstate intercity bus trips, 49 C.F.R. § 1061.1 (1991), and federal rules control smoking in facilities owned by the General Services Administration. 41 C.F.R. § 101-20.105.3 (1991). In addition, the Bureau of Prisons has banned smoking in many areas of federal prisons, 28 C.F.R. § 551.160 (1991); prison officials must, "[t]o the extent practicable," place non-smoking inmates in non-smoking quarters, and double celling of smokers with non-smokers "will be "avoided except where impractical due to circumstances, and then may be done only for limited duration." *id.* at § 551.162. *See* Pet. App. C27-C28). [11]

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[11] As a counter-indication, the state *amici* note (at 12-13) that OSHA rejected an emergency rulemaking petition to have ETS regulated as a "grave danger," and the District of Columbia Circuit affirmed in an unpublished opinion. Neither fact has any consequence here. An "emergency temporary standard" is designed to remedy hazards so "grave" that the rule may be issued without notice and comment and may take effect immediately upon publication in the Federal Register; the emergency standard can remain in effect for no more than six months, at which point it must be superseded by the final rule. 29 U.S.C. § 655(c)(1). However, the power to issue emergency standards is to be used only in "limited situations," given the "extraordinary power" which the statute confers upon OSHA; that power should be "delicately exercised" and used only as "an unusual response to exceptional circumstances." *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1155 (D.C. Cir. 1983) (internal citations omitted). If anything, OSHA's recent

With respect to enactments at the state and local level, the court of appeals noted that, as of 1987, 45 states and the District of Columbia had passed laws regulating tobacco use. Pet. App. C26, *citing Avery v. Powell*, 695 F. Supp. 632, 640 (D.N.H. 1988), *citing in turn* Note, "An Overview of Current Tobacco Litigation and Legislation," 8 *U. Bridgeport L. Rev.* 133, 175-82 (1987)(compiling state statutes). The court added that, as of May 1990, county and state correctional departments in 13 states had banned smoking or were considering such a ban and that the American Jailers Association had passed a resolution on behalf of 6500 jail administrators in favor of a ban on inmate smoking (Pet. App. C28). [12]

A recent article in the *Journal of the American Medical Association* helps quantify the extent to which state and local laws provide protections from compelled exposure to ETS. Rigotti and Pashos, "No-Smoking Laws in the United States: An Analysis of State and City Actions to Limit Smoking in Public Places and Workplaces," 266 *J. Am. Med. Ass'n* 3162 (December 1991). The authors conducted a survey of no-smoking laws adopted by states and by cities with a population of 25,000 or greater, and the findings are revealing because they indicate a "national consensus" in favor of at least some limitations on unwanted exposure to ETS.

At the state level, the study found that, by the end of 1989, "all but six states had adopted some restriction on smoking in

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request for data about ETS as a prelude to regulating exposure in the workplace is an indication of the importance which OSHA attaches to addressing hazards of ETS. *See* 56 Fed. Reg. 47,892-93 (1991).

[12] In citing this last item, we acknowledge the Court's point that legislative enactments are given primacy in measuring current societal attitudes and that reports and resolutions by expert organizations are not conclusive to the extent that they are not embodied in legislative enactments. *See Penry v. Lynaugh*, *supra*, 492 U.S. at 335; *cf. Stanford v. Kentucky*, *supra*, 492 U.S. at 369 n.1 (experience in other countries may be helpful in confirming that historical accident is not the reason for state or local laws which ban a practice in this country). To the extent that the Jailers Association' call for a total ban on inmate smoking implicitly embraces the less sweeping relief sought here, we submit that it confirms the societal attitudes discussed in the text.

public places or workplaces," although these laws varied in comprehensiveness: 35 state laws limited smoking in public places, 22 required no-smoking sections in restaurants, and 12 addressed smoking in private workplaces; ten states had comprehensive no-smoking laws. *Id.* at 3164.

At the local level, over half of the nearly 1000 cities surveyed "had taken some action to limit smoking" as of 1 July 1989, *id.* at 3163, including limits on smoking in government buildings (42% of cities), as well as restrictions on smoking in one to three enumerated public places (such as theaters or stores)(32%), in more than three public places (27%), in restaurants (24%), and in private workplaces (18%); comprehensive laws had been adopted in 165 of the cities (17%). *Id.* at 3164.

These numbers do not reveal the full impact of these laws. According to the study, "Over two-thirds of the nearly 100 million Americans residing in cities with a population of 25,000 or greater were covered by some type of local smoking restriction, and over one third lived in cities with comprehensive no-smoking ordinances." *Id.* at 3164. These figures are not static. From 1980 until July 1989, there was a tenfold increase in the number of local laws, with two types of laws showing the most growth, *viz.*, comprehensive laws and those covering government buildings; in addition, every year between 1982 and 1988 saw the enactment of more laws than in the previous year (although a decline of new laws was deemed possible in 1989). *Id.*

Not surprisingly, the study found that cities are more willing to adopt smoking restrictions when no state law exists, just as city no-smoking laws are less common in states with comprehensive no-smoking laws. *Id.* at 3166. The study noted too that, by excluding polities with populations below 25,000, it may be understating the extent to which the American population enjoys protections from unwanted tobacco smoke. *Id.* Nonetheless, the study concluded, by combining the available city and state data, that by mid-1989, "nearly all urban Americans were covered by a state or local smoking restriction." *Id.*

To be sure, the data do not indicate a consensus in favor of a comprehensive ban on smoking everywhere in public, but that is not the point. The point is that, at a minimum, there is a remarkable legislative consensus in favor of at least *some* limi-

tation on compelled exposure to ETS where one is likely to come in contact with other people in enclosed spaces. Wherever that line may be drawn, this study suggests a consensus *against* the unrelieved exposure to ETS of which Mr. McKinney complained, *i.e.*, no escape from compelled exposure to ETS in one's living quarters, and compelled exposure to ETS in a community where two-thirds of the population smokes and where smoking is allowed everywhere except the infirmary and dining hall (J.A. 51). [13]

This consensus in favor of some limitation is surely as strong as it was in cases which invalidated state laws using similar comparisons with laws elsewhere. *See Enmund v. Florida*, 458 U.S. 782, 792-93 (1982)(invalidating laws in eight states imposing death penalty on robbers convicted of felony murder; Eighth Amendment protection not limited to cases such as *Coker v. Georgia*, 433 U.S. 584 (1977), where only one state follows challenged practice); *see also Thompson v. Oklahoma,*

[13] By contrast, as the state *amici* note (at 12), approximately 70 percent of all Americans do not smoke. These *amici* try to blunt the force of this fact by arguing that up to 77 percent of the non-smoking workforce is exposed to passive smoke while at work. However, if only 30 percent of the relevant population smokes, the exposure at work alone is likely to be considerably smaller than in the Carson City prison, where two-thirds of the inmates smoke.

The *JAMA* article cited in the text does note two seemingly offsetting trends: (1) the enactment in a few state-wide laws which limit smoking, but do so in a manner which preempts stronger local ordinances, and (2) the enactment of state laws which prevent employers from discriminating against employees who smoke, even where smoking is banned or restricted in the workplace. 266 *J. Am. Med. Ass'n* at 3167. Neither development undermines our point that the legislative trend is strongly in favor of at least some restrictions on unwanted exposure to ETS. The first category of laws reflects a tradeoff under which some smoking restrictions are extended to cover all state residents, although more restrictive local laws are barred. The second reflects a refinement in the law under which employers can be required to limit smoking in the workplace (or ban it entirely), but they cannot take adverse actions against workers who smoke at home or in places outside the workplace where smoking is allowed. *Compare* N.J.S.A. §§ 26:3D-23 and -25 (1987) with N.J.S.A. §§ 34:6B-1 and -2 (1992 Supp.).

supra, 487 U.S. at 849-51 (O'Connor, J., concurring); *compare Stanford v. Kentucky*, *supra*, 492 U.S. at 371-72. [14]

Neither the State nor its *amici* come to grips with these points. Instead, the State offers the generalization that ordinary citizens have no right to be free of tobacco smoke, Pet. Br. at 26, but, as the foregoing discussion suggests, there is a growing consensus which opposes unlimited exposure to ETS, even among people who may face less of a risk and enjoy more mobility than do individuals such as Mr. McKinney. As to the Solicitor General's claim that forced exposure to ETS is just part of the price one pays for being convicted of a crime, U.S. Br. at 22, the severe hazards associated with such exposure, as outlined in the previous section, take ETS out of the realm of the "routine discomfort" or inconvenience that must be tolerated as part of prison life. *Hudson v. McMillian*, *supra*, 112 S. Ct. at 1000.

The Solicitor General also posits that no Eighth Amendment violation can occur because smoking is a habit deeply rooted in our history and that we have "effectively chosen to accept the considerable risks that result from individual choices, to smoke, including the secondary effects of smoking on non-smokers." U.S. Br. at 20. This claim ignores the sea change in public attitudes towards involuntary exposure to ETS, as evidenced by the cited discussion of state and local laws on this issue. Nor are historic attitudes a helpful guide here: Asbestos "has been known to man since ancient times," *Borel v. Fibreboard Paper Products Corp.*, *supra*, 493 F.2d at 1083 n.3, *and see id.* at 1083-85, but in recent decades at least, one would be hard pressed to argue that society willingly accepts the risks of exposure to asbestos or that the consequences of such exposure

[14] The Nevada legislature responded to the first appellate ruling in this case by amending its law barring smoking in "public buildings" to exempt facilities used to house or serve inmates (Pet. App. F1, F7). That change does not affect the analysis here because a legislative determination that smoking should not be banned entirely cannot be equated with a legislative endorsement of virtually unlimited exposure to secondary cigarette smoke. And in any event, Nevada prison authorities have adopted a policy designed to limit smoking in Nevada prisons.

are merely a "routine discomfort" of the sort which must be endured as part of a criminal sentence. [15]

Under *DeShaney* and *Youngberg*, the fact that civilians may willingly expose themselves to hazards does not mean that prison officials may expose those entrusted to their custody to the same conditions. As the dissenting judges observed in *Clemmons v. Bohannon*, *supra*:

> [T]he fact that people who are free to do so choose to expose themselves to serious health risks cannot justify the arbitrary, involuntary exposure of a prisoner to those risks. It would be absurd to suggest that because people ride with drunk drivers, practice bungee jumping, sky-dive, and ride motorcycles without helmets, a prison official could therefore require an inmate to do so over his objection.

956 F.2d at 1533 n.3 (Seymour, J., dissenting).

Finally, the State and the Solicitor General argue that laws which regulate exposure to ETS, without banning smoking outright, reflect an effort to balance competing needs and that, in a prison context, any proposed limits on smoking would have to weigh considerations of security, morale and other issues of prison administration. Pet. Br. at 19-20; U.S. Br. at 21-22. Once again, we object to any effort to engage in a balancing of evidence when there is none in the record which can be balanced. Moreover, any balancing of exposure to a known carcinogen against whatever competing interests may be cited

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[15] It is also suggested that an Eighth Amendment violation cannot be found in this context when "[t]wo hundred years ago, many of our most revered founding fathers were tobacco farmers." U.S. Br. at 24, *quoting Caldwell v. Quinlan*, 729 F. Supp. 4, 6 (D.D.C.), *aff'd mem.*, 923 F.2d 200 (D.C. Cir. 1990), *cert. denied*, 112 S. Ct. 295 (1991). *See also Steading v. Thompson*, *supra*, 941 F.2d at 500. This Court has made it clear, however, than in an Eighth Amendment context, it is not bound by what may have been regarded as enlightened policy in 1789, *see* p. 19, *supra*, even though the Court has looked to contemporary practices in interpreting other Amendments. *E.g.*, *Marsh v. Chambers*, 463 U.S. 783 (1983). Also, we doubt that the founding fathers would have been indifferent to a hazard which science later proved to be less benign than was once thought, but to cause over 30,000 needless deaths each year.

should be carried out during the inquiry as to whether the subjective component of an Eighth Amendment violation has been established, an inquiry that is analytically distinct from the question presented by this case, which is whether a particular condition or situation is, objectively speaking, severe enough to be a possible Eighth Amendment violation. The question of *why* prison officials may choose to tolerate a particular hazard is entirely separate from the question of *whether* that hazard is harmful enough to warrant the protections of the Eighth Amendment. Since only the latter issue is now before the Court, the argument of the State and the Solicitor General is irrelevant.

CONCLUSION

Because of the recent developments in this case, we respectfully suggest that the writ should be dismissed. On the merits, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Attorneys for Respondent

October 1992

APPENDIX

STATE OF NEVADA
DEPARTMENT OF PRISONS
OFFICE OF THE DIRECTOR

MEMORANDUM

DATE : January 10, 1992

TO: ALL WARDENS AND MANAGERS
FROM: RON ANGELONE, DIRECTOR
SUBJECT: SMOKING POLICY

ADMINISTRATIVE DIRECTIVE # 53-92
(supersedes A.D. 24-91)

Smoking in program, food preparation/serving, recreational and medical areas is restricted to those areas specifically designated for that purpose. These areas include, but are not limited to, classrooms, libraries, gymnasiums, chapels, culinary's, industries and infirmaries.

Smoking by inmates and/or staff is strictly prohibited during meetings (i.e., staff meetings, training, inmate treatment groups) and during individual inmate counseling/treatment sessions, medical and/or mental health encounters. Employees/inmates are not allowed to smoke in offices shared by others unless every individual in the office agrees to allow smoking.

It is the responsibility of the respective Wardens to designate smoking areas for staff and inmates, consistent with the requirements outlined above. The Assistant Director/Support Services, with the approval of the Director, shall designate smoking areas in Central Office-North. The Assistant Director/Prison Industries, with the approval of the Director, shall designate smoking areas in Central Office-South.

Contingent upon space availability, Wardens may further designate non-smoking sections in inmate dormitory settings. Reasonable efforts may be made by the institutional classifi-

cation committees to accommodate non-smokers in double bunked housing areas. Non-smoking inmates who wish to be housed with another non-smoking inmate are to provide a written request to the Associate Warden Programs/Facility Manager. As with any incompatible inmate living situation, accommodations will be as necessary, consistent with security considerations and space availability.

/s/ Ron Angelone

Ron Angelone, Director
NEVADA DEPARTMENT OF PRISON

INMATE ACCESS
YES: xx
NO:

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

WILLIAM McKINNEY,	)	Case No.
	)	CV-N-87-36-ECR
Plaintiff,	)	
	)	
vs.	)	**MOTION FOR**
	)	**SUBPOENA TO**
PAT ANDERSON, et al.,	)	**PRODUCE AN**
	)	**EXPERT WITNESS**
Defendants.	)	**AT TRIAL**

Comes Now, William McKinney, plaintiff in Pro Se, and moves this court, pursuant to Fed. R. Civ. P. Rule 45 (A), (b), (c), (E), and F.R.C.P. Rule 26(b)(4) *et seq.*, for an order securing an expert witness at his trial set to commence on September 22nd, 1987.

That this motion is made and based upon all the motions, affidavits, pleadings and the verified civil rights complaint on file in the above-entitled court.

For cause of said motion plaintiff shows *viz*:

1. That it is *important* to his case that the court issue a subpoena for one or all of the following persons:

(A) *The Surgeon General*, expert on cigarette smoking;

(B) A representative from *Action on Smoking & Health*;

(C) *National Interagency Council on Smoking & Health*, representative;

(D) A representative from the Food & Drug Administration.

2. Any of the above-named representatives is an authority on the effects cigarette smoking would have on a non-smoker housed in close confines with a heavy cigarette smoker.

DATED this 19 day of August 1987.

Respectfully submitted

By /s/ William McKinney
WILLIAM MCKINNEY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM McKINNEY,	)	
	)	
Plaintiff,	)	Case No.
	)	CV-N-87-36-ECR
vs.	)	
	)	
PAT ANDERSON, et al.,	)	**ORDER**
	)	
Defendants.	)	

Pending in the above-entitled matter are plaintiff's Motion for Subpoena to Produce Expert Witnesses (court docket #14A) and Petition for Writ of Habeas Corpus Ad Testificandum (court docket #14B) both filed August 21, 1987. The pleadings arose from plaintiff's attempt to secure witnesses to testify at a combined hearing on plaintiff's Motion for Preliminary Injunction and trial on the merits which had been set for September 22, 1987 but vacated on defendants' motion to allow consideration of their Motion for Summary Judgment.

Strictly speaking, the motions are moot; however, a report and recommendation is being entered recommending that defendants' Motion for Summary Judgment be denied. If the District Court issues its order adopting the recommendation, plaintiff may be expected to renew his requests. A ruling on these requests should expedite and clarify the evidentiary situation for the parties.

Plaintiff's motion for a subpoena to produce an expert witness at trial requests the court to issue a subpoena for one or all of the following: (1) the Surgeon General of the United States; (2) a representative from Action on Smoking and Health; (3) a representative from the National Interagency Council on Smoking and Health, and/or (4) a representative from the Food and Drug Administration.

Apparently plaintiff intends for the court to locate and procure one or more of these officials to provide testimony for

him. He had not provided any information on where such individuals may be found or cited authority to show the court has jurisdiction to take such action. He does not indicate he has communicated with any such person so that he has any idea about their competence or ability to testify about his individual circumstances, etc. Thus, he is also asking the court to pick witnesses for him.

The choosing and obtaining of witnesses for a party is that party's responsibility and in a civil case the paying of witness fees, transportation costs and the like also become that party's responsibility and not the court's or the opposing party's duty. This is so even for plaintiffs who have been allowed to file *in forma pauperis*. Further, a subpoena for a hearing or trial must be served within the district or if outside the district within 100 miles of the place of the hearing or trial. Fed.R.Civ.P. 45(e)(1). The court suspects these persons may be outside that area and therefore not subject to its subpoena power.

Plaintiff has not shown the court that it has the authority to grant what he requests. He might consider attempting to find a local expert witness from the state university medical school or finding authoritative writings upon the subject he wishes to present. *See* for example Fed. R. Evid. 803(8) and (18). Whatever he may decide the presentation of his evidence is his responsibility.

Plaintiff's Petition for Writ of Habeas Corpus Ad Testificandum requests the court issue a writ to have prison officials make present for testimony some six inmate witnesses who apparently have been roommates or friends of plaintiff and who have heard him complain about the effects of tobacco smoke on him, etc.

The practice in this district is that when a matter is ready for trial in a civil case involving an inmate plaintiff, the court (without a petition for writ of habeas corpus) orders the defendants' counsel (who is a Deputy Attorney General) to have present for trial plaintiff and any of plaintiff's witnesses who are employees or inmates of the Nevada Department of Prisons. This does not mean that the court will order that all inmates or employees requested be present. The court will require that the plaintiff specify the particular testimony of

each witness and why he or she is needed. The court will not order the presence of individuals whose testimony will be repetitious or duplicative of other expected witnesses or documentary evidence. Plaintiff should also consider that he himself should be able to testify to most if not all of the areas he has stated he expects his requested inmate witnesses to testify to. As set forth above, all of the other witnesses listed by plaintiff must be obtained through the usual subpoena process which requires plaintiff to tender the witness fee.

Good cause appearing therefor,

IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Subpoena to Produce Expert Witnesses (court docket #14A) filed August 21, 1987 is *denied*; and

2. Plaintiff's Petition for Writ of Habeas Corpus Ad Testificandum (court docket #14B) filed August 21, 1987 is *denied*.

DATED this 8th day of APRIL, 1988.

/s/ Phyllis Halsey Atkins
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

WILLIAM McKINNEY,	)	
	)	Case No.
Plaintiff,	)	CV-N-87-36-ECR
	)	
vs.	)	
	)	**MOTION FOR**
PAT ANDERSON, et al.,	)	**COURT APPOINTED**
	)	**EXPERT WITNESS**
Defendants.	)	

Comes now, the plaintiff William McKinney, in Pro Se, moves this Honorable Court, pursuant to the Federal Rules of Civil Procedure and the Federal Rules of Evidence 706(A), (b) and (d); F.R.E. 702; F.R.E. 703 and F.R.E. 705, for appointment of an expert witness, an environmental toxicologist, to give testimony and evidence at the trial in this matter.

This Motion is made and based upon all the pleadings, papers, motions and the complaint on file in this court.

This motion is further made and based upon the points and authorities attached hereto.

For cause of said motion plaintiff shows *viz*:

(1) That the testimony of an environmental toxicologist is absolute[ly] necessary to clarify the facts in this case for a jury.

(2) Plaintiff has no training as an environmental toxicologist.

(3) Without the testimony of an environmental toxicologist plaintiff cannot prove the effect of a smoker's sidestream smoke upon a nonsmoker.

(4) That plaintiff has contacted an environmental toxicologist by way of letter communication. In his reply to plaintiff's letter, the toxicologist stated as follows:

"Dear Mr. McKinney:

Excuse the handwritten note — I was about to leave town when the Dean sent your letter to me.

I am an environmental toxicologist (trained at the Johns Hopkins Univ.) and have served as an expert witness in alcohol, drug & toxicity trials. My consulting work is not associated directly with the university. My fee is $80/hr.

I'll be happy to discuss your case with you upon my return on 9 (sic) May 88."

(5) Plaintiff is in dire need of this environmental toxicologist's testimony concerning the danger of sidestream cigarette smoke to a nonsmoker's health, but his indigency prevents him from paying the costs and expenses of the said witness:

A. This witness' fee is eighty dollar an hour;

B. This witness will be needed for approximately three (3) hours during the trial and six (6) hours during investigations by plaintiff.

C. This witness will have to travel from Reno Nevada to the Nevada State Prison in order for plaintiff to investigate him.

D. The Department of Prison[s] do[es] not pay for telephone calls to such witness, and plaintiff is only allowed to make collect calls from the prison.

E. This witness will have to do research on issues raised in plaintiff's civil rights complaint, xerox any information discovered and mail it to the plaintiff or bring it to him.

G. The environmental toxicologist is George G. Bierkamper, Ph.D., is Associate Professor at the University of Nevada School of Medicine. His business address is the Department of Pharmacology, Howard Medical Science Building, Reno, Nevada 89557-0056. Telephone Number (702) 784-4118.

Dated this 17 day of May 1988

RESPECTFULLY SUBMITTED

By /s/ William McKinney
William McKinney, In Pro Se

I

POINT AND AUTHORITIES IN SUPPORT OF MOTION FOR COURT APPOINTED EXPERT WITNESS

See, F.R.C.P. Rule 26 (b), (4) *et seq*.

Cf. eg., Danville Tobacco Assn. v. Bryan-Buckner Associates, Inc., 333 F.2d 202 (4th Cir. 1964).

It is important that the jury view the expert witness in person to observe his demeanor while he testify [*sic*] to the dangers a nonsmoker risk[s] by being housed in an 8' x 6' room, without ventilation, with a heavy cigarette smoker.

CONCLUSION

Here, plaintiff has shown that he is an indigent prisoner without funds sufficient to cover the expenses of an expert witness who will testify at the trial in this case. The expert witness' testimony is absolute[ly] necessary in trial of this case.

Wherefor[e],

Plaintiff prays that this court appoint an environmental toxicologist as an expert witness for the plaintiff;

That this expert witness be compensated for his participation in trial, discovery research, and travel expenses.

For whatever other relief this court may deem appropriate.

RESPECTFULLY SUBMITTED

By /s/ William McKinney
William McKinney, In Pro Se

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM McKINNEY,	)	
	)	
Plaintiff,	)	Case No.
	)	CV-N-87-36-ECR
vs.	)	
	)	
PAT ANDERSON, et al.,	)	**ORDER**
	)	
Defendants.	)	
	)	

This matter is before the court on the plaintiff's motion for a court appointed expert witness (court docket #23). The defendants have not filed a response. The plaintiffs allege that the testimony of an environmental toxicologist is necessary in order to clarify the facts of this case for a jury. (Court docket #23, p. 2). The purpose of such testimony is to show the dangerous effect of a smoker's side stream smoke upon a non-smoker. (Court docket #23, pp. 2-3).

The plaintiff urges that the court may appoint such a witness on the authority of Fed.R.Civ.P. 26(b)(4) and Fed.R. Evid., 702, 703, 705 and 706. Review of these rules reveals that only Fed.R.Civ.P. 26(b)(4) and Fed.R.Evid. 706 concern the payment of fees.

Although initially the plaintiff does not state that this expert witness would testify on the plaintiff's behalf, that appears to be his intention. "This witness will have to travel from Reno to the Nevada State Prison in order for plaintiff to investigate him." (Court docket #23, p. 3). Further, "[tlhis witness will have to do research on issues raised in plaintiff's civil rights complaint, xerox any information discovered and mail it to the plaintiff or bring it to him." (*Id.*) The plaintiff estimates that the witness would be needed for three hours during the trial and six hours during investigations by plaintiff. (*Id.*) Finally, in support of his motion the plaintiff concludes

that "[i]t is important that the jury view the expert witness in person to observe his demeanor while he testify to the dangers a nonsmoker risk by being housed in an 8' x 6' room, without ventilation, with a heavy cigarette smoker." (Court docket #23, p. 4).

The plaintiff misapprehends the nature of Fed.R.Evid. 706. This rule provided for the appointment of an impartial expert. "The court may appoint any expert witnesses *agreed upon by the parties, and* may appoint expert *witnesses of its own selection*." Fed.R.Evid. 706 (emphasis added). The expert's duties are those which the *court* informs him or her in writing.

Thereafter, the expert advises the parties of his or her findings. Each party may depose the expert. At trial the expert may be called to testify by either party or the court. Additionally, the parties may also call their own expert witnesses. Fed.R.Evid. 706(d).

The appointment of experts by the court occurs rather infrequently. Such appointments are not for the benefit of a particular party. Moreover, court appointed experts do not become the representatives on behalf of a particular party. Such experts serve as an independent source of assistance to the court, and from whom the parties may learn of his or her findings.

Although an expert witness would be of value to the plaintiff, such can be said of virtually all civil cases. At present, the court is not aware of any Nevada or federal statute or rule which provides for the payment of expert witness fees in civil cases on behalf of indigent plaintiff. *See*, Magistrate's Report and Recommendation, court docket #19, p. 3.

Rule 706 is not such a provision. Fed.R.Evid. 706. It permits a court to appoint its own witness, not to undertake to pay the fees for a party's expert witness. In fact, subsection (b) provides that the compensation for such expert "is payable from funds which may be provided by law *in criminal cases and civil actions* and proceedings *involving just compensation under the Fifth Amendment*." Fed.R.Evid. 706(b). In all other cases the parties themselves pay for the appointment of the court's expert. "In other civil actions and proceedings the

compensation [of the expert witness] shall be paid by the parties...." *Id.*

Accordingly, the plaintiff's motion (court docket #23, is *denied*.

DATED this 2nd day of SEPTEMBER, 1988.

/s/ Phyllis Halsey Atkins
UNITED STATES MAGISTRATE

Supreme Court, U.S.
FILED
NOV 20 1992
OFFICE OF THE CLERK

No. 91-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,

Petitioners,

v.

WILLIAM McKINNEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF ON THE MERITS

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I.

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II.

ARGUMENT

A. CONTRARY TO RESPONDENT'S SUGGESTION OF MOOTNESS, THE NEVADA DEPARTMENT OF PRISONS' POLICY ON SMOKING IN INMATE HOUSING AREAS HAS NOT CHANGED SINCE THE INCIDENTS WHICH GAVE RISE TO THIS CIVIL RIGHTS CLAIM, AND THE LIKELIHOOD THAT MCKINNEY WILL AGAIN BE HOUSED WITH A SMOKER HAS INCREASED.

McKinney and his Amici, the American Civil Liberties Union and the American Civil Liberties Union of Nevada, argue there have been "substantial" factual developments which may render a consideration of this case (at least as to injunctive relief) moot. Their position is based primarily upon McKinney's current housing in a single cell in a different Nevada correctional facility (Ely State Prison, hereinafter ESP), and a policy issued by the Director of the Nevada Department of Prisons (hereinafter NDOP) on January 10, 1992, regulating smoking throughout the state prison system. (Administrative Directive

53-92 dated January 10, 1992 - see Resp. Br., Appendix 1a). Respondents' understanding of the facts is, however, in error.

1. McKinney's housing is subject to change at any time. He is a 45-year-old convicted murderer who has been serving a life sentence, with two consecutive fifteen year sentences, and will be incarcerated for quite a few years, perhaps for the remainder of his life. Inmates frequently are transferred from one facility to another, or from one unit to another, for many reasons. Although McKinney may now be enjoying single cell status, this is unlikely to last for the reasons that ESP is a relatively new facility which now operates at close to capacity. As greater numbers of prisoners have entered the system, ESP has been converting single cells into double cells. Further conversions are

planned just to keep apace with normal increases in the prison population. Due to a state budget crisis, in early 1992 the entire medium custody facility located in Jean, Nevada was closed, causing the NDOP to reclassify and transfer approximately five hundred inmates among the remaining medium and maximum custody facilities in Nevada, including ESP. This, too, was a factor in the conversion of single cells into double cells at ESP. Because of continuing budget constraints, the likelihood that any new prison facilities will be funded is doubtful, and it is quite possible prison administrators may be compelled to close other facilities. Single cell to double cell conversions are anticipated for this reason also.

2. The underlying facts which allegedly prompted McKinney to file this particular civil rights lawsuit are quite

clearly capable of repetition. If the state were to raise the claim of mootness whenever McKinney's cell assignment changed or he was transferred to another facility, then McKinney's Eighth Amendment issue might never be judicially reviewed. He would have to file a new lawsuit every time he believed he was compelled unconstitutionally to share a cell with an inmate who smoked.

3. McKinney errs in stating the NDOP policy on smoking in prison facilities is new and changes the factual posture of this case. To the contrary, Administrative Directive 53-92 was primarily a revision of a previously-existing policy. (See Appendix to U.S. Br.) A.D. 53-92 superseded A.D. 24-91, issued January 7, 1991; A.D 24-91 superseded A.D. 35-90, issued January 15, 1990; and A.D. 35-90 superseded A.D. 56-89, issued on September 28, 1989.

(Copies of all these administrative directives will be lodged with the Court for its reference). Over the past four years, each of these directives stated the NDOP's policy on smoking within the state prison system, revised on an annual basis. All were non-confidential directives, available for inmate review (including by McKinney) in each of the prison law libraries. The most recently revised policy added a few common areas to those places designated as off-limits for smokers, but made no change in the portion of the policy which has been the focus of McKinney's complaint, specifically, that although reasonable efforts are made to accommodate non-smoking and smoking inmates, they are still subject to being housed together.

> Contingent upon space availability, Wardens may further designate non-smoking sections in inmate dormitory settings. Reasonable efforts may be made by the institutional classification

committees to accommodate non-smokers in double bunked housing areas. Non-smoking inmates who wish to be housed with another non-smoking inmate are to provide a written request to the Associate Warden Programs/Facility Manager. As with any incompatible inmate living situation, accommodations will be as necessary, consistent with security considerations and space availability.

(Appendix to U.S. Br.).

This language has essentially been a part of every administrative directive issued by the NDOP. When compared with the Affidavit of Don Helling, which was attached to defendants' Motion for Summary Judgment in June, 1987, it is readily apparent each successive administrative directive reflected what already had been the unofficial policy within the prison system, which provided that after an inmate is given an initial classification, his housing assignment will take into account his personal preferences "insofar as practical." (Joint Appendix at p. 21).

McKinney therefore errs when he argues this case is now moot. Under the "specific live grievance" requirement (Lewis v. Continental Bank Corp., 494 U.S. 472, 479 (1990)), McKinney can certainly expect he will be housed from time to time with smokers during his incarceration. Thus, the controversy is very much alive.

In addition, there are other important reasons for a decision in this case. It could be years before another case involving the issue of exposure by inmates to ETS reaches this stage. In the meantime, prison administrators are without any clear guidance as to their potential liability for placing smoking and non-smoking inmates in cells together, for varied lengths of time. The decision in this case is important because the ability of both state and federal prison officials to keep

flexibility and discretion in choosing how best to manage and control dangerous inmates, within budget, security and facility constraints, is at stake. This case will define the limits of Eighth Amendment claims where healthy inmates allege that their exposure to certain conditions pose future, though neither certain nor imminent, potential health risks. Amici and petitioners must know if prison officials will be required to protect inmates from exposure to ETS and any other types of potential health hazards, even when the non-incarcerated public is not similarly protected, and the particular hazard is generally tolerated in society as an acceptable risk.

4. Amici for McKinney argue the only portion of this case remaining is that of injunctive relief, and that McKinney has not challenged the district court's

finding that petitioners did not act with deliberate indifference to his medical symptoms (ACLU Br. at p. 10). But the Ninth Circuit Court of Appeals, on remand, reaffirmed its earlier decision that (a) McKinney had satisfied the objective part of the test for stating an Eighth Amendment claim and (b) the district court should reconsider whether petitioners had acted with deliberate indifference. (Pet. for Writ of Cert., Appendix A). Following the Ninth Circuit's order, petitioners filed their second petition for writ of certiorari, which presumably the Court would not have granted had it been satisfied that a remand to the district court for another trial was appropriate.

In any event, the state of mind of petitioners (for the purpose of determining deliberate indifference under the subjective component of Wilson v.

Seiter, 111 S. Ct. 2321 (1991)) may be irrelevant if this Court decides that McKinney cannot state a claim under the objective standard.

B. MCKINNEY HAD HIS OPPORTUNITY TO PRESENT EVIDENCE TO SUPPORT HIS CASE AT TRIAL; THE U.S. MAGISTRATE PROPERLY EXERCISED HER DISCRETION IN DENYING MCKINNEY'S MOTIONS TO APPOINT AND SUBPOENA EXPERT WITNESSES

1. McKinney argues he was improperly deprived of his right to present his case before the district court. This simply is not an accurate representation of the factual history of the case. McKinney took his complaint to trial, testified on his behalf, presented documents on his behalf, and called witnesses on his behalf. (Minutes of Trial, Joint Appendix at pp. 66-73). The U.S. Magistrate allowed all of McKinney's exhibits into evidence except one, which consisted of literature distributed by anti-smoking groups and primarily concerned with health risks of tobacco to

smokers, not to those exposed to secondary smoke. (Exhibit 14 of trial exhibits lodged with this Court). Although the trial transcript is unavailable, it is likely McKinney was unable to establish a foundation for the admission of these exhibits. McKinney represented himself to be a non-smoker and was attempting to prove the health risk to non-smokers of exposure to ETS. The literature in Exhibit 14 did not address that issue and was therefore properly excluded. McKinney was permitted to argue for admission of Exhibit 14 on the second day of trial, and the U.S. Magistrate took his motion under submission. On the third day of trial, the Magistrate denied his motion to admit Exhibit 14. (Minutes of Trial, Joint Appendix at pp. 71 and 73).

2. McKinney asserts it was improper for the U.S. Magistrate to deny his

motion for a court-appointed expert witness. (Resp. Br. at p. 3). He argued that he needed an environmental toxicologist to help him prove his case:

> Here, plaintiff has shown that he is an indigent prisoner without funds sufficient to cover the expenses of an expert witness who will testify at the trial in this case. The expert witness' testimony is absolute[ly] necessary in trial of this case. Wherefor[e], Plaintiff prays that this court appoint an environmental toxicologist as an expert witness for the plaintiff; That this expert witness be compensated for his participation in trial, discovery research, and travel expenses...

(Resp. Br., Appendix 8a).

But as the U.S. Magistrate explained:

> "the appointment of experts by the court occurs rather infrequently. Such appointments are not for the benefit of a particular party. Moreover, court appointed experts do not become the representatives on behalf of a particular party. Such experts serve as an independent source of assistance to the Court, and from whom the parties may learn of his or her findings.

(Resp. Br., Appendix 11a).

The purpose of F.R.E. Rule 706 is not to appoint an expert witness to help a party prove his case, but rather to assist the Court in evaluating and deciding the facts in a case. It is within the sound discretion of the Court to make that determination, and McKinney has not pointed to a single fact to show that an abuse of discretion occurred. The argument that McKinney or any indigent plaintiff believes his case will be more easily proven with the assistance of an expert witness is not in and of itself an appropriate or sufficient reason for the Court to appoint an expert. As the U.S. Magistrate pointed out, "Although an expert witness would be of value to the plaintiff, such can be said of virtually all civil cases."

(Resp. Br., Appendix 21a).

3. McKinney also complains the U.S. Magistrate refused to issue subpoenas he

requested be issued for certain experts. (Resp. Br. at p. 3). He fails to explain, however, the experts consisted of the Surgeon General and several unnamed representatives of federal agencies. The Court stated:

> Apparently plaintiff intends for the court to locate and procure one or more of these officials to provide testimony for him. He has not provided any information on where such individuals may be found or cited authority to show the court has jurisdiction to take such action. He does not indicate he has communicated with any such person so that he has any idea about their competence or ability to testify about his individual circumstances, etc. Thus, he is also asking the court to pick witnesses for him.
> The choosing and obtaining of witnesses for a party is that party's responsibility and in a civil case the paying of witness fees, transportation costs and the like also become that party's responsibility and not the court's or the opposing party's duty...a subpoena for a hearing or trial must be served within the district or if outside the district within 100 miles of the place of the hearing or trial...

(Resp. Br., Appendix 6a).

The record shows the U.S. Magistrate's ruling was sound, and McKinney has failed to give any reason to show it was not.

4. Respondent argues the U.S. Magistrate did not hear evidence or rule on whether petitioners (defendants at trial) were deliberately indifferent to petitioner's future potential injuries, only that they were not indifferent to his then-existing health symptoms, and therefore respondent should have the opportunity to prove the subjective component of Wilson on remand. (Resp. Br. at p. 17). McKinney suggests this was error on the part of the U.S. Magistrate, but it is not. The U.S. Magistrate can only rule on the evidence offered by the parties. McKinney presented his case in chief, and it was McKinney who failed to proffer sufficient admissible evidence to show deliberate indifference either to his presente or

future health. McKinney had his day in court and it was his burden, not the Court's, to prove his case. (Pet. Br. at pp. 32-33).

Similarly, McKinney states that the Ninth Circuit remanded the case to the district court because "the magistrate did not consider evidence which might indicate whether conditions at Carson City might pose such a[n] [unreasonable] risk [of harm] to Mr. McKinney." (Resp. Br. at p. 16). Once again, it was McKinney's burden to present sufficient admissible evidence for the U.S. Magistrate's consideration. Respondent appears to argue the question is whether the U.S. Magistrate "correctly dismissed a cause of action relating to the future effects of ETS exposure simply because he [McKinney] was not presently suffering any readily apparent effects of that exposure." (Resp. Br. at p. 18). The

case law by the U.S. Magistrate in her order granting the motion for a directed verdict clearly supported her decision. (Pet. for Writ of Cert., Appendix B).

C. INMATE EXPOSURE TO OTHERS' TOBACCO SMOKE IS NEITHER CRUEL NOR UNUSUAL UNDER THE EIGHTH AMENDMENT, GIVEN THE SPECULATIVE NATURE OF THE PERCEIVED RISK, SOCIETY'S AMBIVALENT ATTITUDES REGARDING SMOKING, AND THE EXISTENCE OF COUNTERVAILING PENOLOGICAL INTERESTS

Case law has long recognized a prisoner's right to a safe environment. Prison officials may not intentionally place prisoners in dangerous surroundings nor be deliberately indifferent to their serious medical needs. It is one thing, however, to deliberately place known enemies in the same cell, or to permit inmates with serious infectious diseases to come into contact with other inmates where contagion is a virtual certainty. These are circumstances where the danger is both obvious and imminent, and where . . .

there is no real dispute as to current societal standards of decency.

However, there are other conditions which may exist in prisons to which inmates are exposed for varying lengths of time and intensity, and for which the risk of harm is neither obvious nor imminent, and about which society does not universally agree. ETS is one of those conditions.

Just as non-prisoners are exposed to various risks accepted by society, prisoners cannot expect to be free of all risks to which they may be exposed. (Pet. Br. on Merits at pp. 17-19). The overwhelming majority of recent federal court decisions have held that decisions concerning exposure to ETS are best left to legislative enactments and to the judgment of those who must manage our prisons. (See Gorman v. Moody, 710 F.Supp. 1256, 1262 (N.D.Ind. 1989);

Kensell v. State of Oklahoma, 716 F.2d 1350, 1351 (10th Cir. 1983) and Federal Employees for Non-Smokers Rights (FENSR) v. United States, 446 F. Supp. 181, 185 (1978).

There are significant differences in the types of conditions discussed by McKinney and the instant case. That is, the degree to which the existence of secondary tobacco smoke is tolerated by society, and why cigarettes are an important management tool for prison administrators.

1. PRISON OFFICIALS' DISCRETION IN CONTROLLING INMATE POPULATIONS IS ESSENTIAL, AND PERMITTING INMATE SMOKING IS A LEGITIMATE AND NECESSARY MANAGEMENT TOOL.

Respondent implies the reason McKinney (a claimed non-smoker) possessed cartons of cigarettes in 1987 was they were used as a form of currency in the prison, and that cigarettes were distributed to inmates free of charge by the NDOP to

Nevada State Prison inmates. (Resp. Br. at p. 5). However, respondent fails to note this practice was discontinued in 1981, six years before he filed his lawsuit. The footnote also cites the amicus brief of the United States, which pointed out that distributing free cigarettes was "...a practice once followed in the federal prison system, where some inmates received free cigarettes as a means of 'institutional management and control and to prevent the development of extortionate practices in connection with the sale of cigarettes to inmates.'" (U.S. Br. at p. 19). Indeed, this is still a practice followed by some federal agencies.[1]

This is understandable in light of statistics showing that anywhere from 75% to 90% of inmates smoke. (U.S. Br. at p. 14, n. 8). There are a limited number of ways in which prison officials can occupy and control inmate populations, and thus any methods which are effective are important. (U.S. Br. at 13; Pet. Brf. on Merits at pp. 19-20). Inmates are permitted very few items of personal property and/or amenities, so that any possession or privilege becomes much more important to an inmate than to a person not in prison. Items such as tobacco, candy, magazines and televisions are typical examples of privileged items which prison officials use in managing difficult prisoners and to avoid inmate unrest. (U.S. Br. at p. 23).

Prison administrators view the availability of tobacco and the privilege of smoking as a significant inmate management tool. Those who must classify, house and control difficult and

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[1] Petitioners are informed that the Department of Immigration and Naturalization Services presently distributes cigarettes to federal detainees incarcerated at the Nevada State Prison.

dangerous persons who aren't where they want to be are daily confronted with safety and security concerns, as well as the need to keep as many inmates as possible occupied and reasonably content. When up to 90% of inmates smoke, smoking (as with television) plays an important role in accomplishing these goals.

This Court has long recognized the unique position of prison administrators and the extremely difficult tasks they face. It is difficult for those who have never operated a prison to appreciate the extent to which inmates attempt to manipulate, intimidate and abuse both prison employees and the court system in order to exercise some control over their housing and facility assignments, as well as over other aspects of their situation. It is imperative that this Court reaffirm the deference accorded prison officials in managing our nation's state and

federal prisons, and specifically recognize that exposure to ETS in a prison setting does not state an Eighth Amendment claim.

2. CURRENT LAWS, REGULATIONS AND CUSTOMS CLEARLY DEMONSTRATE SOCIETY'S AMBIVALENCE TOWARD SMOKING, AND EXPOSURE TO ETS DOES NOT VIOLATE CONTEMPORARY STANDARDS

There are many examples of the government's ambivalence toward tobacco. On the one hand, the Surgeon General cautions about the potential health hazard of extended exposure to secondary tobacco smoke, cautionary labels are required on cigarette packaging and many federal work places have smoking and non-smoking areas. (U.S. Br. at pp. 14-15, 18). On the other hand, the growth of tobacco is subsidized by the federal government, it has been a traditional practice for prisons to issue free cigarettes to inmates, and the Occupational Safety and Health

Administration has thus far not deemed it necessary to regulate smoking in the workplace. People smoke freely in their homes and in many public places. (U.S. Br. at 12, 22-23).

In Wilson v. Lynaugh, 878 F.2d 846 (5th Cir. 1989), cert. denied, 110 S.Ct. 417 (1989), the Court found a prisoner's suit challenging exposure to ETS concerned a condition more a discomfort or inconvenience rather than one considered either cruel or unusual, and stated, quoting Gorman v. Moody, supra, at p. 126, that "...society cannot yet completely agree on the propriety of nonsmoking areas and a smoke free environment." The Court stated:

> Society certainly includes the government. The government both bestows substantial subsidies on those who grow and process tobacco and, at the same time, demands warning labels on cigarette packages and supports the apparatus

. . .

> of the Surgeon General in his public exhortations against the evils of smoking tobacco.

(Wilson, at p. 851, n. 14).

The Ninth Circuit's first opinion in this case noted "the existence of widespread bans on smoking in public areas and confined places." (Resp. Br. at p. 7). However, the use of the word "bans" presents a somewhat inaccurate picture of the reality of such regulations. For example, the federal prison rules "designed to protect non-smokers" are essentially no different than the guidelines set forth in NDOP's Administrative Directive 35-92, and the Court is invited to compare the two. (See 28 C.F.R. 551.160 et seq). Respondent states the American Jailers Association "backed a ban on smoking in prisons." But he fails to state how many jailers have actually instituted bans or restrictions on smoking, and whether such

measures have been effective or not. It should be pointed out that jails traditionally house prisoners for much shorter periods of time than do state correctional facilities.[2]

Respondent states the Ninth Circuit found that "[c]ounty and state corrections departments in 13 states had either banned or were considering a ban on cigarette smoking in prison as of May 1990." (Resp. Br. at p. 7). This means 37 states apparently had <u>not</u> taken such action. The statement also does not clarify if the regulations to be imposed were total or partial smoking restrictions. A number of states, including Nevada, have statutorily

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[2] Petitioners are informed that the average length of stay in a county jail in either of the two most populous counties (Washoe and Clark) is less than two weeks.

<u>excluded</u> prison facilities from such laws. (Pet. for Writ of Certiorari at p. 23).

Neither respondent nor the Court of Appeals noted that in state legislation restricting smoking in public places, there are often exceptions carved out for certain types of businesses, such as smaller restaurants. State legislatures balance competing interests and enact laws which in their judgment best accommodate those interests. For example, in Nevada smoking is generally prohibited in grocery stores, but smoking is permitted within the area of the store devoted to providing gaming machines for their patrons' amusement. Smoking is also permitted in any business which receives over half of its gross receipts from the sale of alcohol. (Nev. Rev. Stat. 202.2491, Pet. for Writ of Certiorari, Appendix F). Even where

smoking is generally prohibited in public buildings, statutes typically direct that areas designated for smokers be provided. (Nev. Rev. Stat. 202.2491, Pet. for Writ of Certiorari, Appendix F). It is therefore more accurate to state that in some states smoking is regulated, rather than banned, and society still tolerates and in some instances encourages smoking.

There does not appear to be any data (and respondent offers none) regarding the extent to which restrictions on smoking have been sought because exposure to ETS is offensive or irritating to a number of people, because it can be a fire hazard, or because of concern for the potential health problems.

Despite the existence of various regulations on smoking, "Secondary tobacco smoke is common in offices, restaurants, and other public places throughout the United States and the rest

of the world." Steading v. Thompson, 941 F.2d 498, 500 (7th Cir. 1991) [Court found that exposure of inmate to ETS was not a "serious deprivation" within the meaning of the test set forth in Wilson v. Seiter].

Respondent criticizes Petitioners for not attempting to rebut the "scientific and other authorities" used by the Ninth Circuit in reaching its conclusion that exposure to environmental tobacco smoke could violate the Eighth Amendment. (Resp. Br. at p. 11). Quite simply, petitioners were never given the opportunity by the Ninth Circuit to respond to the data relied upon by that Court. The Ninth Circuit's decision was a fait accompli, issued without having given either party an opportunity to brief the specific issue of whether exposure to certain levels of environmental tobacco smoke could state

an Eighth Amendment claim. The Court of Appeals did not limit itself to the points and authorities presented to it by the parties, but rather chose to rely on data not subject to the scrutiny of the briefing process.

Respondent asks this Court to find that exposure to a condition posing an unreasonable risk of serious harm states an Eighth Amendment claim, even where the inmate has not yet suffered any serious medical symptoms and specifically argues that exposure to ETS states such a claim. (Resp. Br. at pp. 30 - 36). McKinney offers several pages of "authorities" to buttress his claims that exposure to ETS is a health risk. Assuming that exposure to ETS presents a risk to one's health, the relevant questions are (1) whether the risk is statistically significant; (2) whether the risk is accepted in our society; and (3) whether the existence of

the risk is counterbalanced in a prison setting by other legitimate penological concerns.

Although McKinney cites studies to indicate that exposure to ETS may increase one's exposure to certain respiratory problems and to lung cancer, he fails to explain how and why this risk is statistically important. Although he states "the risk at issue here is also of a far greater magnitude than the risks that are regulated by the Occupational Safety and Health Administration" he does not correspondingly explain why OSHA is not presently imposing restrictions on exposure to ETS in the workplace. (Resp. Br. at p. 35)

McKinney relies also on a draft Surgeon General's report containing the opinion that exposure to ETS is "a cause" of lung cancer, and recommending that measures to protect the public from ETS

should be taken. (Resp. Br. at p. 36). McKinney does not state whether, compared with other health risks, the Surgeon General determined if ETS is a statistically major or minor cause of lung cancer. In any event, whatever the recommendations of the Surgeon General may be, it is up to the legislature to decide whether it exposure to ETS is a problem sufficient "to justify appropriate remedial action." (Resp. Br. at p. 36).

A review of case law, legislative enactments, and the actions of regulatory agencies indicate that our society does not at this time view exposure to ETS as a significant enough health risk to warrant any greater protective action than has already been taken. Clearly, any potential health risks which may be associated with exposure to ETS are still tolerated in our society, just as the far

greater risks linked to automobile travel are tolerated because the risks are counterbalanced by a competing social interest in mobility. Similarly, the presence of knives and guns is tolerated even though the risk of harm is self-evident, as such implements also serve other important purposes.

It is clear that persons who are not incarcerated have no constitutional claim to pursue should they believe they have been subjected to substantial quantities of secondary tobacco smoke. (Pet. Br. at pp. 29-30; See also Caldwell v. Quinlan, 729 F. Supp. 4 (D.D.C. 1990) aff'd, 923 F.2d 2009 (D.C.Cir. 1990). The general public is limited to pursuing tort claim remedies, and inmates have the same opportunity to litigate claims of exposure to unreasonable risks of harm.

It is worth noting that meeting a negligence standard requires a lower

burden of proof than does reaching the level needed to sustain a constitutional claim, yet claims against cigarette companies by smokers and those exposed to ETS have met with little or no success. It would be unusual, indeed, if inmates could state constitutional claims regarding ETS, while non-incarcerated litigants have no constitutional protection and, as a practical matter, no realistic chance of prevailing in tort claims on the same issue.

3. EXPOSURE TO ETS DOES NOT MEET THE OBJECTIVE TEST OF WILSON V. SEITER BECAUSE THERE IS NO SERIOUS DEPRIVATION OF A BASIC HUMAN NEED, AND NO INFLICTION OF PAIN.

In DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 200 (1989) the Court stated prison officials have a responsibility to provide for an inmate's "basic human needs", such as food, clothing, shelter, medical care and safety. The Ninth

Circuit itself is frequently quoted regarding the extent to which prison systems must provide for inmates:

> [A]n institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care and personal safety.

(Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982), quoting Wright v. Rushen, 642 F.2d 1129, 1132-1133 (9th Cir. 1981). The objective portion of an Eighth Amendment claim is only met when it can be shown an inmate has suffered a sufficient harm involving the deprivation of "the minimal civilized measure of life's necessities" Rhodes v. Chapman, 452 U.S. 337, 346 (1981). Once the State has provided an inmate with these essential human needs, however, its obligation "is at an end." Hoptowit v. Ray, supra.

One may sympathize with the discomforts suffered by those in prison,

including non-smokers who dislike the exposure they may have to ETS. But an inmate cannot state an Eighth Amendment claim on the grounds that exposure to ETS deprives them of any basic human need. Likewise, the desire to be housed in an environment where exposure to ETS is limited does not involve a sufficiently serious injury to be considered either cruel or unusual.

McKinney disagrees with the recent decision of the Tenth Circuit in Clemmons v. Bohannon, 956 F.2d 1523, 1527 (10th Cir. 1992) (en banc), in which that Court pointed out the U.S. Supreme Court has not ever "held that a potential, distant harm to a prisoner's health is a serious medical need." (Resp. Br. at p. 22). He asserts this would limit Eighth Amendment claims to situations involving either immediate injuries or a virtual certainty of future death or painful illness. But

this drastic situation is not the logical conclusion to be drawn from Clemmons. There is nothing in the Tenth Circuit's opinion to foreclose all Eighth Amendment claims where the likelihood of serious harm is clear, although neither immediate nor certain, the condition of confinement is unacceptable under society's evolving standards of decency, and there is no important countervailing penological interest.

Petitioner lists numerous cases where courts have held that inmates "need not wait [until they are physically assaulted]" before obtaining injunctive relief against conditions posing a threat to their personal safety (citing Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980; Morgan v. District of Columbia, 824 F.2d 1049 (D.C. Cir. 1987; Purvis v. Ponte, 929 F.2d 822 (1st Cir. 1991)). Petitioners submit McKinney cannot

establish the elements necessary to obtain injunctive relief, since he has not set forth facts to show he will suffer irreparable harm from being housed with a smoker. This condition of confinement is not comparable to the situations in which plaintiffs were able to demonstrate that their immediate physical safety was in serious jeopardy.

It is well established that some conditions of confinement which involve occasional, or short-term, or uncomfortable, or of de minimus impact upon a prisoner, are not Eighth Amendment violations. If these same conditions persist for longer periods of time, however, the possibility that the condition may be considered cruel and unusual increases. (Hutto v. Finney, 437 U.S. 678, 687 (1978)).

McKinney speculates that although occasional or short-term exposure to ETS

would not result in an Eighth Amendment violation, "evidence of indifference to a constant exposure at levels that pose an unreasonable risk of serious injury would be another matter entirely." (Resp. Br. at p. 26). Petitioners believe the inquiry is whether any potential future risk of harm to an inmate's health from exposure to environmental tobacco smoke can be considered cruel and unusual punishment. It is respectfully submitted that it cannot, due to the peculiar status of smoking within our society and its importance in the prison setting, and because any risk of potential future harm to one's health is, at this point, simply too speculative.

Respondent argues the risk of future harm to his health is logically included in the definition of what constitutes "serious injury" sufficient under Wilson v. Seiter. Petitioners disagree.

Although courts have held an inmate need not wait until he experiences physical injury in order to obtain relief, the conditions which may qualify for protection in this area are distinguishable from exposure to ETS.

1. Smoking is socially acceptable to the vast majority of inmates (from 75% to 90% according to estimates (U.S. Br. at p. 14, n. 8);

2. The sale and consumption of tobacco is legal in all states and is not prohibited under current health and safety regulations; (U.S. Br. at p. 12).

3. Any potential health risk from the exposure to ETS is neither certain nor imminent, and is as yet completely speculative as to any individual;

4. Elimination or reduction of the conditions referred to by respondent is not intertwined with complex housing,

. . .

classification and security decisions peculiar to prison management;

5. Any ventilation problems which inmates might face by exposure to ETS can be addressed adequately through legislation, and by health and safety agencies responsible for air quality regulation;

6. This particular condition of confinement, unlike other challenged conditions, involves a personal habit shared by a large percentage of people, and which is generally tolerated in our society; (U.S. Br. at p. 12).

7. Any potential risk from ETS is counterbalanced by the importance of allowing prison administrators the necessary discretion to balance a number of safety and security concerns, and to permit smoking among inmates as a significant prison management tool.

. . .

(Pet. Br. on Merits at pp. 19-20; U.S. Br. at 13).

Petitioners do not dispute the need to protect inmates from conditions which society in general finds unacceptable to the point of being cruel and unusual, and which otherwise satisfy the requirements of Wilson v. Seiter. But exposure to environmental tobacco smoke involves a widespread personal habit which is not only accepted in our society, but often supported and encouraged. Just as important to the resolution of this issue is the need to recognize the importance of preserving prison administrators' precious few methods of managing the most volatile and discontented members of our society, and the need for wide discretion and flexibility in making housing decisions when housing options may be severely limited.

. . .

III.

CONCLUSION

For the reasons set forth herein, Petitioners ask this Court to vacate the judgment of the Ninth Circuit Court of Appeals, and to hold that an inmate cannot state an Eighth Amendment claim by alleging compelled exposure to environmental tobacco smoke in the absence of existing related health problems.

DATED: November 20, 1992

Respectfully submitted.

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Supreme Court, U.S.
FILED
AUG 27 1992
OFFICE OF THE CLERK

No. 91-1958

In the Supreme Court of the United States

OCTOBER TERM, 1992

DONALD L. HELLING, ET AL., PETITIONERS

v.

WILLIAM MCKINNEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether, in this suit against state prison officials under 42 U.S.C. 1983, respondent has stated a claim of cruel and unusual punishment in violation of the Eighth Amendment based on his exposure to secondary cigarette smoke while in prison, even though he failed to establish that he had serious medical needs resulting from the exposure and that prison officials were deliberately indifferent to any such needs.

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INTERESTS OF THE UNITED STATES

The court of appeals in this case held that an inmate's exposure to secondary tobacco smoke constitutes cruel and unusual punishment within the meaning of the Eighth Amendment if the exposure is at a level found by a court to pose an unreasonable risk of harm to his health. Congress has recognized and addressed the health hazards of smoking through labeling requirements, see *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2615-2617 (1992); the Department of Health and Human Services and other federal agencies have conducted numerous studies of the effects of smoking and exposure to secondary tobacco smoke; and Congress and federal agencies (including the Bureau of Prisons) have adopted restrictions on smoking in certain places under federal control. The United

States also is responsible for enforcing the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, which authorizes the Attorney General to bring an injunctive action against state officials if he has reason to believe that they are "subjecting persons residing in or confined to [a prison or correctional facility] * * * to egregious or flagrant conditions which deprive such persons" of constitutional rights. 42 U.S.C. 1997a(a). At the same time, the Attorney General, through the Bureau of Prisons, is responsible for managing federal correctional institutions and for the "safekeeping, care, and subsistence" of persons maintained in them. 18 U.S.C. 4042. As a consequence, the Department of Justice defends actions brought by federal inmates alleging that conditions of their confinement violate the Eighth Amendment. The United States therefore has several significant interests in the development of sound principles governing application of the Eighth Amendment in this setting.

STATEMENT

This case presents the question whether a prison inmate's exposure to secondary cigarette smoke—sometimes known as environmental tobacco smoke (ETS)—constitutes "cruel and unusual punishment" within the meaning of the Eighth Amendment.

1. Respondent William McKinney was convicted of murder in state court and is serving his sentence in the Nevada prison system. At the time this case arose, he was incarcerated in the Nevada State Prison in Carson City, Nevada.[1]

On December 18, 1986, respondent filed a pro se complaint under 42 U.S.C. 1983 against the Director of the Nevada Department of Prisons, the warden and associate

[1] At about the time the court of appeals rendered its first decision, respondent was transferred to the Ely State Prison. Br. in Opp. 5; Reply Br. Pet. Stage 10.

warden of the Nevada State Prison, and a unit counselor at the prison. J.A. 1-3. He alleged, *inter alia*, that he had shared a cell with a series of roommates who were heavy smokers; that he had unsuccessfully requested to be moved to a single room or to a room with a nonsmoker; that smoking is also allowed in classrooms and the law library; and that prison officials had done nothing to separate nonsmoking inmates from those who smoked. J.A. 5-10. Respondent further alleged that he suffered from nosebleeds, headaches, loss of energy to exercise, shortness of breath, and chest pains as a result of exposure to secondary cigarette smoke, and that the exposure constituted cruel and unusual punishment in violation of the Eighth Amendment. J.A. 10-12. Respondent sought an injunction prohibiting petitioners from housing him with inmates who smoke, as well as compensatory and punitive damages. J.A. 14-15.

In their answer, petitioners admitted that respondent had at various times requested not to be housed with inmates who smoked, but denied that "they have done nothing to separate the nonsmoking inmates from the smokers" and stated that they "have made efforts to do so, to the greatest extent possible." J.A. 17. Petitioners also filed an affidavit of petitioner Helling, who described the assignment of inmates for housing within the prison. J.A. 21-24. He explained that an inmate is first classified to a particular housing category, such as general population, protective custody, administrative segregation, or disciplinary segregation. J.A. 22. The inmate is then assigned to a particular unit, wing and cell, based on such factors as "possible enemy situations, the age of the inmate, friendships and ethnic balance within particular housing wings. The personal desires of the inmate are also taken into account insofar as practical." *Ibid.* Helling stated that the relief respondent sought—a prohibition against placing him in any wing of a unit that houses inmates who smoke—"would severely

limit the prison's housing options." J.A. 23. Helling also stated that "[s]moking is very important to many inmates," and expressed the view that "if smoking were banned at [the Nevada State Prison] it would create a potentially dangerous situation due to the anger of those inmates who do smoke." *Ibid.*

2. The parties consented to trial before a magistrate, who consolidated respondent's motion for a preliminary injunction with the trial on the merits. After presentation of respondent's case, the magistrate granted petitioners' motion for a directed verdict and entered judgment in their favor. Pet. App. D1-D10.

The magistrate first rejected respondent's contention that he has a constitutional right to be housed in a smoke-free environment. Pet. App. D3-D7. She noted that while "society may be moving toward an opinion as to the propriety of non-smoking and a smoke-free environment, society cannot yet completely agree on the propriety of non-smoking areas and a smoke-free environment." *Id.* at D3. It follows, the magistrate reasoned, that whether to provide smoke-free areas in a prison "must be left to the discretion of legislatures and prison officials who must operate the prison to the best of their abilities, and those officials must make those decisions after consideration of all factors relevant to the particular institution and the care and welfare of all inmates." *Id.* at D4 (quoting *Gorman* v. *Moody*, 710 F. Supp. 1256, 1262 (N.D. Ind. 1989)).

The magistrate therefore concluded that respondent could prevail on his Eighth Amendment claim only if he showed that petitioners were "deliberately indifferent" to "serious medical needs" that he was currently experiencing due to exposure to secondary cigarette smoke. Pet. App. D5-D6. Based on testimony adduced by respondent, however, the magistrate found that he had "failed to show either a serious medical need or deliberate indifference to it." *Id.* at D7. She pointed out that although

respondent complained of sore throat, watery eyes, and similar "cold symptoms" when exposed to secondary cigarette smoke, he "admitted on cross-examination [that] he ha[d] also complained of those symptoms resulting from exposure to butane gas, living in a lower bunk, the quality of water at the prison, as well as the quality of his diet," and conceded that "he had no idea what actually caused these symptoms and just assumed that it was the cigarette smoke." *Ibid.* Respondent also admitted on cross-examination (and his witnesses'-testimony showed) that he had been examined for these "cold-like" symptoms by the prison's medical department, that the examining physician found nothing wrong for which he could be treated, and that he was told his symptoms could not be definitely traced to exposure to cigarette smoke. On this record, the magistrate concluded that respondent had "completely failed" both "to establish deliberate indifference to serious medical needs" and "to adduce any expert testimony or provide any medical evidence which would prove [that petitioners'] acts were the proximate cause of his injuries" or that "exposure to cigarette smoke could even cause such symptoms." *Id.* at D8-D10.

3. The court of appeals affirmed in part and reversed and remanded in part. Pet. App. C1-C48. It affirmed the directed verdict for petitioners on respondent's claim of deliberate indifference to serious medical needs, observing that respondent "was examined by the prison doctor, who found no serious existing ailments requiring treatment." *Id.* at C39-C40.

The court of appeals further held, however, that the magistrate had erred in framing the broader issue in "all-or-nothing terms"—*i.e.*, that respondent either has a broad constitutional right to a smoke-free environment, or has only a right to medical attention for proven serious medical needs—because that approach "excluded a valid eighth amendment claim lying between these two extremes: that compelled exposure to levels of ETS that

pose an unreasonable risk of harm to human health constitutes cruel and unusual punishment." Pet. App. C5. The court previously had held that exposing a prisoner who is particularly sensitive to ETS because of a preexisting medical condition may constitute cruel and unusual punishment. *Id.* at C10 (citing *Franklin* v. *Oregon*, 662 F.2d 1337, 1346-1347 (9th Cir. 1981) (housing an inmate suffering from throat cancer with a smoker may violate the Eighth Amendment)). In this case, the court of appeals extended that rationale to hold that such exposure violates the Eighth Amendment even where the inmate does not have a special vulnerability, if a court finds that continual involuntary exposure to ETS poses an "unreasonable" risk of harm to his health. Pet. App. C14.

In reaching this conclusion the court of appeals relied on reports issued by the Surgeon General between 1979 and 1986 regarding the environmental and health effects of exposure to secondary smoke, and a draft report on that subject released by the Environmental Protection Agency in 1990. Pet. App. C14-C19. The court also found it significant that unlike the general population, prisoners are not free to avoid or leave places where smoking is allowed; that approximately two-thirds of the inmates in the Nevada State Prison smoke;[2] that respondent had been confined in a six-foot by eight-foot cell with a roommate who smoked; and that smoking also was permitted elsewhere in the prison, except in the infirmary and culinary.[3] *Id.* at C19-C20. For these reasons, the court believed that a showing that exposure to ETS endangers human health would be sufficient to establish an Eighth Amendment violation, even without a separate inquiry into society's evolving standards of decency.

[2] See also J.A. 21 (affidavit of petitioner Helling); J.A. 50 (joint pretrial order).

[3] See also J.A. 50 (joint pretrial order).

Id. at C21-C25. But in addition, the court believed that "the attitude of our society has evolved at least to the point that it violates current standards of decency to expose unwilling prisoners to ETS levels that pose an unreasonable risk of harm to their health." *Id.* at C25-C26.

The court of appeals remanded the case to the district court to allow respondent to present evidence regarding the level and degree of his exposure to ETS and whether that exposure is sufficient to create an unreasonable risk of harm to his health. Pet. App. C30.[4] The court held, however, that petitioners are entitled as a matter of law to qualified immunity from suit for damages in their personal capacities, because at the time they acted, "there was no clearly established liability for exposing prisoners to ETS." *Id.* at C31.[5]

4. Petitioners then sought review in this Court. The Court granted their petition, vacated the judgment of the court of appeals, and remanded for further consideration in light of *Wilson* v. *Seiter*, 111 S. Ct. 2321 (1991). Pet. App. B1-B2. There, the Court held that a claim that prison conditions violate the Eighth Amendment has both an objective and a subjective component, the latter requiring a prisoner to establish "deliberate indifference" on the part of prison officials.

5. On remand, the court of appeals reinstated its judgment and remanded for further proceedings consistent with both its own prior opinion and *Wilson* v. *Seiter*. Pet.

[4] The court recommended that the district court exercise its authority under Fed. R. Evid. 706 to appoint an environmental toxicologist as an expert witness, who could furnish the court with scientific evidence on the health effects of ETS and the concentration levels of ETS at the Nevada State Prison. Pet. App. C35-C38.

[5] The court of appeals also held that the Nevada statute barring smoking in public places applied to the prison's library. Pet. App. C32-C34. The Nevada Legislature subsequently amended the statute to exempt correctional facilities from coverage. See Reply Br. Pet. Stage 16.

App. A1-A7. The court of appeals explained that *Wilson* v. *Seiter* simply added another element to an Eighth Amendment claim, and did not vitiate its holding that exposure to levels of ETS that pose an "unreasonable risk" of harming an inmate's health satisfies the objective component of the Eighth Amendment standard. *Id.* at A5-A6.

6. On January 10, 1992, before the court of appeals rendered its decision on remand, the Director of the Nevada Department of Prisons adopted a formal smoking policy. App., *infra*, 1a-2a. Under that policy, smoking is prohibited in classrooms, libraries, gymnasiums, chapels, culinaries, industries and infirmaries, except in areas specifically designated for that purpose. In addition, "[c]ontingent upon space availability," wardens may designate non-smoking sections in inmate dormitory settings, and "[r]easonable efforts may be made by the institutional classification committees to accommodate non-smokers in double-bunked housing areas." *Id.* at 2a. Non-smoking inmates who wish to be housed with another non-smoking inmate must submit a request in writing, and "[a]s with any incompatible living situation, accommodations will be made as necessary, consistent with security considerations and space availability." *Ibid.*

SUMMARY OF ARGUMENT

A. Respondent does not challenge the finding by both courts below that he failed to prove that he now has any "serious medical needs" as a result of his exposure to environmental tobacco smoke (ETS), or that prison officials have been "deliberately indifferent" to any such needs. Respondent likewise does not challenge the court of appeals' holding that petitioners are entitled to qualified immunity from suit for damages. All that remains of this case, then, is respondent's request for injunctive relief barring petitioners from housing him in the future with inmates who smoke. The appropriateness of such injunctive relief presumably would be affected by the smoking policy promulgated by the Director of the Nevada Department of Prisons in January 1992, which neither court below has examined. But the novel Eighth Amendment claim endorsed by the court of appeals is without merit quite aside from that policy.

Under this Court's cases, an Eighth Amendment challenge to conditions of confinement has both an objective component and subjective component. The former requires the prisoner to show that the challenged conditions have resulted in "serious deprivations of basic human needs." *Rhodes* v. *Chapman*, 452 U.S. 337, 346-347 (1981). The subjective component requires the prisoner to show "deliberate indifference" to those needs on the part of prison officials.

B. Mere exposure to ETS does not violate the objective component of the Eighth Amendment standard. Smoking is widespread in society, and millions of people are exposed to its secondary effects on a daily basis. Exposure to ETS in prison therefore cannot be regarded as "cruel" or "unusual" or even as "punishment" within the ordinary meaning of those words, much less in the heightened sense in which they are used in the Eighth Amendment.

This is not to minimize the important issues of public health, environmental quality, and personal preference associated with smoking, including its secondary effects on nonsmokers. Congress, the Secretary of Health and Human Services, and other federal officials have recognized those concerns, and have adopted some regulation of smoking in places under federal control. But it does not follow that such regulatory measures are required by the Constitution whenever an inmate might be exposed to ETS, because the Eighth Amendment does not incorporate whatever code of environmental regulations have been adopted by Congress, the Executive Branch, or state and local governments for society at large.

Moreover, the words "cruel" and "unusual"—and this Court's understanding of the Eighth Amendment as being concerned with the "unnecessary and wanton infliction of

pain," *Hudson* v. *McMillian*, 112 S. Ct. 995, 998 (1992) (emphasis added)—indicate that the impact of the punishments proscribed by the Eighth Amendment was expected to be direct and palpable. Accordingly, the Eighth Amendment is directed at actual or immediate harms of a serious nature. It does not, at least as a general rule, apply to potential and distant harms, such as the possibility that an inmate might experience adverse health effects in the future as a result of his exposure to ETS while in prison.

It also is significant that smoking is a habit that is deeply rooted in our history and experience. Despite the adverse consequences of smoking from the perspective of the public health, smoking continues to be lawful. Accordingly, at least for the present, we have, as a society, effectively chosen to accept the considerable health risks associated with smoking, including its secondary effects on nonsmokers. Accordingly, the absence of a smoke-free environment in prison cannot be regarded as the denial of a "minimally civilized measure of life's necessities." *Wilson* v. *Seiter*, 111 S. Ct. 2321, 2323 (1991). Although governmental bodies have adopted some restrictions on smoking, they do not reflect a universal condemnation of smoking of the sort that would be required to support respondent's claim. Rather, such measures respond at least in part to environmental concerns and matters of personal preference; and they often reflect and seek to accommodate the strongly opposing views of smokers and nonsmokers, including the differing importance the two groups attach to the health consequences of smoking. The court of appeals' recognition of an Eighth Amendment claim based on mere exposure to ETS also fails to respect the corresponding need for prison administrators to weigh the desires of smokers and nonsmokers and to maintain flexibility in inmate assignment.

C. Both the record developed to date and the smoking policy adopted by the Director in January indicate that respondent could not satisfy the subjective component of the Eighth Amendment standard either. However, if the

Court does not reverse the Ninth Circuit's ruling regarding the objective component of respondent's Eighth Amendment claim, it may choose to remand for the lower courts to consider the subjective component in the first instance. The lower courts' application of the "deliberate indifference" standard in this setting would require consideration of the countervailing interests of inmates who smoke and the difficulties faced by prison administrators in accommodating those interests.

ARGUMENT

A PRISON INMATE CANNOT ESTABLISH AN EIGHTH AMENDMENT VIOLATION BASED ON HIS EXPOSURE TO ENVIRONMENTAL TOBACCO SMOKE, IN THE ABSENCE OF A SHOWING OF DELIBERATE INDIFFERNCE TO SERIOUS MEDICAL NEEDS HE EXPERIENCES AS A RESULT OF THE EXPOSURE

A. Introduction

1. The magistrate found that respondent had "completely failed" to prove either the existence of any "serious medical needs" as a result of his exposure to environmental tobacco smoke (ETS) in the Nevada State Prison, or "deliberate indifference" to any such needs on the part of prison officials. Pet. App. D6-D10. The court of appeals affirmed those findings, *id.* at C38-C40, and respondent does not challenge them here. Nor does respondent challenge the court of appeals' holding that petitioners are entitled to qualified immunity from suit for damages in their individual capacities. See Br. in Opp. 4 n.1. All that remains, then, is respondent's request for injunctive relief barring petitioners from housing him in the future with inmates who smoke. J.A. 14.

The smoking policy adopted by the Director of the Nevada Department of Prisons last January presumably would undermine respondent's ability to prove a current Eighth Amendment violation on remand and establish the

appropriateness of prospective relief. Neither court below, however, has had an opportunity to consider respondent's Eighth Amendment claim in the concrete text of that new policy.[6] For this reason, respondent's claim before this Court that he has a constitutional right not to be housed in the future with inmates who smoke has a decidedly abstract quality. But his claim was without merit even prior to the Director's recent promulgation of a formal smoking policy. Other courts, in contrast to the Ninth Circuit in this case, have rejected Eighth Amendment claims based on exposure to ETS.[7] This Court should do the same.

2. The Eighth Amendment proscribes the infliction of "cruel and unusual punishments." Although most decisions interpreting the Amendment have involved the constitutionality of sentences imposed by a court, it has also been applied to "deprivations that were not specifically part of the sentence but were suffered during imprisonment." *Wilson* v. *Seiter*, 111 S. Ct. 2321, 2323 (1991). This Court has evaluated the constitutionality of non-sentencing deprivations by assessing whether they involve "unnecessary and wanton infliction of pain." See *Hudson* v. *McMillian*, 112 S. Ct. 995, 998 (1992); *Wilson* v. *Seiter*, 111 S. Ct. at 2323; *Graham* v. *Connor*, 490 U.S. 386, 398 n.11 (1989); *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986); *Rhodes* v. *Chapman*, 452 U.S. 337, 346 (1981); *Estelle* v. *Gamble*, 429 U.S. 97, 103-104 (1976). This stringent standard is grounded in the recognition

[6] In addition, we have been informed by the Office of the Attorney General of Nevada that respondent is curently housed in a single cell at the Ely State Prison.

[7] See *Clemmons* v. *Bohannon*, 956 F.2d 1523 (10th Cir. 1992) (en banc); *Steading* v. *Thompson*, 941 F.2d 498 (7th Cir. 1991), cert. denied, 112 S. Ct. 1206 (1992); *Caldwell* v. *Quinlan*, 729 F. Supp. 4 (D.D.C.), aff'd, 923 F.2d 200 (D.C. Cir. 1990), cert. denied, 112 S. Ct. 295 (1991); *Gorman* v. *Moody*, 710 F. Supp. 1256 (N.D. Ind. 1989); see also *Wilson* v. *Lynaugh*, 878 F.2d 846, 851 (5th Cir.), cert. denied, 493 U.S. 969 (1989); but see *Avery* v. *Powell*, 695 F. Supp. 632 (D.N.H. 1988).

that only deprivations that constitute *punishment* may violate the Eighth Amendment. *Wilson* v. *Seiter*, 111 S. Ct. at 2325.

Accordingly, the Court has held that an Eighth Amendment challenge to conditions of confinement has both an "objective component" ("was the deprivation sufficiently serious?") and a "subjective component" ("did the officials act with a sufficiently culpable state of mind?"). *Wilson* v. *Seiter*, 111 S. Ct. at 2324. To satisfy the former the prisoner must show that the conditions of his confinement resulted in "serious deprivations of basic human needs." *Rhodes* v. *Chapman*, 452 U.S. at 347; accord, *Wilson* v. *Seiter*, 111 S. Ct. at 2329. To satisfy the subjective component, the prisoner must establish "deliberate indifference" on the part of prison officials—a standard drawn from the holding in *Estelle* v. *Gamble* that a prisoner alleging inadequate medical care must, in order to establish an Eighth Amendment violation, show "deliberate indifference" to his "serious" medical needs. 111 S. Ct. at 2323, 2326 (quoting 429 U.S. at 106).

While related, the objective and subjective components are independent, and they therefore need not be analyzed in any particular order. Nor need both be analyzed if the court finds that the prisoner has failed to satisfy one. Cf. *Strickland* v. *Washington*, 466 U.S. 668, 697 (1984). Here, we shall primarily address the objective component—both because that was the subject of the court of appeals' first decision (which it reinstated on remand from this Court), and because, in our view, the case may be disposed of on that basis alone, without the extensive trial contemplated by the court of appeals.

B. Mere Exposure To Environmental Tobacco Smoke Does Not Violate The Objective Component Of The Eighth Amendment Standard

1. The court of appeals plainly erred in holding that exposure to ETS may constitute "cruel and unusual punishment" within the meaning of the Eighth Amendment,

even in the absence of a showing by the inmate that he experiences serious medical problems as a result of the exposure and that prison officials have been deliberately indifferent to those problems. Smoking is widespread, both in prisons[8] and among the more than 45 million smokers in our society at large.[9] As a consequence, millions of nonsmokers are exposed to ETS on a daily basis, in their homes, workplaces, and elsewhere. Especially when the issue is considered in this broader context, exposure to ETS in prison simply cannot be regarded as "cruel" or "unusual" or even as "punishment" in the ordinary meaning of those words, much less in the special sense in which they are used in the Eighth Amendment.

We do not minimize the important issues of public health, environmental quality, and intense personal preference associated with smoking, including its secondary effects on persons exposed to ETS. To the contrary, beginning with the Surgeon General's 1964 Report on the health hazards of smoking,[10] the United States Government has been at the forefront of assessing and responding to those concerns and educating the public about attendant health risks. Congress responded to the Surgeon General's report (and to planned regulatory initiatives by the Federal Trade Commission) by enacting the Federal Cigarette Labeling and Advertising Act in 1965. Pub. L.

[8] The parties to this case agreed that approximately two-thirds of the inmates in the Nevada State Prison smoke. See J.A. 50; Pet. App. C19. Other estimates of the incidence of smoking among inmates have been as high as 90%. See Pet. App. C46 n.20; Hawaii *et al.* Amici Br. 4.

[9] Centers for Disease Control, *Cigarette Smoking Among Adults —United States 1990*, 41 Morbidity & Mortality Weekly Report (May 22, 1992).

[10] U.S. Dep't of Health, Education and Welfare, U.S. Surgeon General's Advisory Committee, *Smoking and Health* (1964). See also U.S. Dep't of Health and Human Services, Report of the Surgeon General, *Reducing the Health Consequences of Smoking: 25 Years of Progress* (1989).

No. 89-92, § 2, 79 Stat. 282, as amended, 15 U.S.C. 1331-1340. The 1965 Act was amended in 1970 and 1984 to strengthen the warning labels. See Pub. L. No. 91-222, § 2, 84 Stat. 87; Pub. L. No. 98-474, 98 Stat. 2201; *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2615-2617 (1992); see also 15 U.S.C. 1341 (providing for research and public education program).

In addition, as the court of appeals pointed out (Pet. App. C15-C19), the Surgeon General issued a series of studies of ETS between 1979 and 1986. His 1986 report concluded that exposure to ETS is a cause of lung cancer and that acute and chronic respiratory diseases have been linked to ETS.[11] In 1990, the Environmental Protection Agency published notice of a draft report on the subject of passive smoking, which estimated that approximately 3800 lung cancer deaths annually among nonsmokers are attributable to exposure to ETS.[12] Congress and federal agencies have responded to the various concerns about ETS by adopting restrictions on smoking in certain public places and other locations subject to federal jurisdiction.[13] The Bureau of Prisons has adopted regulations restricting smoking in federal prisons. 28 C.F.R. 551.160

[11] U.S. Dep't of Health and Human Services, Report of the Surgeon General, *The Health Consequences of Involuntary Smoking* (1986). See also U.S. Dep't of Health, Education and Welfare, Report of the Surgeon General, *Smoking and Health* (1979); U.S. Dep't of Health and Human Services, Report of the Surgeon General, *The Health Consequences of Smoking: Cancer* (1982); U.S. Dep't of Health and Human Services, Report of the Surgeon General, *The Health Consequences of Smoking: Chronic Obstructive Lung Disease* (1984).

[12] EPA, *Health Effects of Passive Smoking: Assessment of Lung Cancer and Respiratory Disorders in Children (External Review Draft)*; see 55 Fed. Reg. 25,874 (1990).

[13] See 49 U.S.C. App. 1374(d) (Supp. II 1990) (banning smoking on all domestic flights); 14 C.F.R. 252.7 (further regulating smoking on aircraft); 41 C.F.R. 101-20.105-3 (General Services Administration regulations governing smoking in federal buildings).

et seq.[14] And a number of state and local governments likewise have adopted laws, ordinances and policies restricting smoking in public places—including, in some instances, prisons. Pet. App. C25-C29.

It by no means follows, however, that measures such as these are compelled by the *Constitution* whenever it is an inmate who may be exposed to ETS. The Eighth Amendment is not a tool for fashioning a code of prison administration by incorporating whatever environmental regulations happen to have been put in place for society at large at a particular moment in time. The Court should not trivialize the Eighth Amendment's "broad and idealistic concepts of dignity, civilized standards, humanity, and decency," *Estelle* v. *Gamble*, 429 U.S. at 102, by construing it to incorporate or impose such environmental-type standards, binding upon the federal and state governments alike, in the particular context of prison administration.

The Court in fact has recognized that it "must proceed cautiously" in applying the Eighth Amendment to conditions of confinement. *Rhodes* v. *Chapman*, 452 U.S. at 351. And it has stressed that "[i]n assessing claims that conditions of confinement are cruel and unusual, courts must bear in mind that their inquiries 'spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility.'" *Ibid.* (quoting *Bell* v. *Wolfish*, 441 U.S. 520, 539 (1979)).

[14] The Bureau of Prisons' regulations prohibit smoking in libraries, corridors, dining halls, gymnasiums, classrooms and similar places (except in specially designated smoking areas). 28 C.F.R. 551.160(b), 551.162(a). The regulations further provide that "[t]o the extent practicable," the Chief Executive Officer of a prison "shall accommodate nonsmoking inmates in nonsmoking living quarters," and that "[t]he sharing of a cell or living area between a smoker and a nonsmoker will be avoided except where impractical due to circumstances, and then may be done only for limited duration." 28 C.F.R. 551.162(b).

2. Against this background, the formulations used by this Court to give content to the prohibition against "cruel and unusual punishments" foreclose respondent's Eighth Amendment claim based on exposure to ETS. The Court emphasized just last Term that a showing of an "extreme deprivation" is "required to make out a conditions-of-confinement claim." *Hudson* v. *McMillian*, 112 S. Ct. at 1000. The prisoner must show that the challenged conditions have resulted in "serious deprivations of basic human needs"—a denial of the "minimal civilized measure of life's necessities"—as measured against "'the evolving standards of decency that mark the progress of a maturing society.'" *Rhodes* v. *Chapman*, 452 U.S. at 346-347 (quoting *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958)). The prisoner must, in short, show that conditions of his confinement are "inhumane." *Wilson* v. *Seiter*, 111 S. Ct. at 2327.

It follows, as the Tenth Circuit recognized in rejecting the same claim respondent advances here, that the core conditions of confinement addressed by the Eighth Amendment are shelter, sanitation, food, personal safety, medical care, and adequate clothing. See *Clemmons* v. *Bohannon*, 956 F.2d at 1527; see also *Inmates of Occoquan* v. *Barry*, 844 F.2d 828, 836-839 (D.C. Cir. 1988). Respondent's ETS-based claim falls well outside those core areas.[15] It is not premised on the existence of "seri-

[15] The cases relied upon by the court of appeals (Pet. App. C24-C25) in concluding that respondent's claim requires no departure from the previous limits of Eighth Amendment jurisprudence are inapposite. *Hoptowit* v. *Spellman*, 753 F.2d 779 (9th Cir. 1985), which the court of appeals cited for the proposition that prison inmates have a constitutional right to safe conditions of confinement, addressed that issue in the context of safety hazards that posed an immediate risk of injury. See 753 F.2d at 784; see also *Youngberg* v. *Romeo*, 457 U.S. 307 (1982) (discussing constitutional right of institutionalized individual to personal safety from repeated assaults). *Spain* v. *Procunier*, 600 F.2d 189 (9th Cir. 1979), which the court below cited for the proposition that denying prisoners

ous medical needs" that respondent is experiencing at the present time, since both courts below found no merit to such a claim here. Rather, the basis for respondent's claim necessarily is that he might develop such medical needs in the *future*, as a consequence of his exposure to secondary tobacco smoke now. The words "cruel" and "unusual," however, indicate that the impact of the punishments to which the Amendment speaks was expected to be direct and palpable; so too does the Court's interpretation of the Amendment to proscribe those conditions of confinement that amount to "unnecessary and wanton infliction of *pain*." See *Hudson* v. *McMillian*, 112 S. Ct. at 998 (emphasis added).

For these reasons, the Amendment focuses on "the *actual effect* of challenged conditions upon the well-being of the prisoners," *Rhodes* v. *Chapman*, 452 U.S. at 367 (Brennan, J., concurring) (emphasis in original), as well as serious harms that may fairly be characterized as "imminent" or "immediate." Cf. *United States* v. *Bailey*, 444 U.S. 394, 409-411 (1980) (defense of duress or necessity to charge of prison escape); *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136, 2138 (1992) (Article III standing). At least as a general rule, it "does not sweep so broadly as to include possible latent harms to health." *Clemmons* v. *Bohannon*, 956 F.2d at 1527.

Put another way, respondent complains of what is, at most, a failure to provide conditions of confinement that would minimize risks to his future health and well-being. The Eighth Amendment has never been interpreted to impose such a duty on prison administrators. Cf. *Hudson* v. *McMillian*, 112 S. Ct. at 1000 ("society does not

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fresh air may violate the Eighth Amendment, involved an outright denial of any outdoor exercise to prisoners confined for more than four years. Even so, the court declined to hold that deprivation of outdoor exercise "is a per se violation of the eighth amendment." *Id.* at 199.

expect that prisoners will have unqualified access to health care"). Any number of conditions would potentially be the subject of Eighth Amendment claims under that expansive view. For example, the common practice of "double celling," which the Court approved in *Rhodes* v. *Chapman*, may increase the risk of physical or mental injury. See 452 U.S. at 343. Similarly, while prison officials may not serve unsanitary or unwholesome food to prison inmates, the Eighth Amendment does not mandate that prison diets conform to the latest medical evidence concerning what foods are best for long-term health. Thus, the fact that scientific evidence may establish an increased risk of heart disease from eating certain types of food as opposed to others does not mean that it is cruel and unusual punishment for prison officials to serve macaroni and cheese instead of broiled fish.

We do not contend that the Eighth Amendment permits even those conditions of confinement that truly pose a significant risk of proximate and substantial harm to an inmate, so long as the injury has not yet occured and the inmate does not yet suffer from its effects. The Eighth Amendment, for example, plainly bars prison officials from housing an inmate with others who have a serious and readily contagious disease, even though it has not yet been transmitted. See *Hutto* v. *Finney*, 437 U.S. 678, 682-683 (1978). And there may well be other situations in which exposure to toxic or similar substances would present a risk of sufficient likelihood or magnitude—and in which there is a sufficiently broad consensus that exposure of *anyone* to the substance should therefore be prevented—that Eighth Amendment protections would be triggered, even though the effects of the exposure might not manifest themselves for some time.

There is no need in this case to attempt to define more precisely the category of conditions presenting a risk of harm that is sufficiently proximate, substantial, and condemned to run afoul of the Eighth Amendment in this

setting. For however it might be defined, the category cannot reasonably include exposure to environmental tobacco smoke. We acknowledge that the effects of exposure to ETS are significant from a public health perspective. But the possibility that any particular individual will suffer as a result of his exposure to ETS while in prison is speculative, and the circumstances of exposure to ETS in prison may vary widely over time and among inmates. See *Steading* v. *Thompson*, 941 F.2d at 500. Accordingly, the "potential, distant harm" associated with the secondary effects of smoking does not correspond to the "serious medical needs" that the Court found to be encompassed by the Eighth Amendment in *Estelle* v. *Gamble*. See *Clemmons* v. *Bohannon*, 956 F.2d at 1527.

3. More than an assessment of the health risks of ETS in isolation is involved here, however. For better or worse, smoking is a habit deeply rooted in our history and experience. "Two hundred years ago, many of our most revered founding fathers were tobacco farmers." *Caldwell* v. *Quinlan*, 729 F. Supp. at 6. "[T]he Surgeon General has only recently warned against the effects of second-hand smoke," *ibid.*, and "debate persists about how severe the effects of secondary smoke may be." *Steading* v. *Thompson*, 941 F.2d at 500.

It also is significant that although the greater health risks of smoking for smokers themselves *are* well documented and widely acknowledged, smoking still is not generally prohibited, either in prisons or in the Nation at large. At least for the present, we have, as a society, effectively chosen to accept the considerable risks that result from individual choices to smoke, including the secondary effects of smoking on nonsmokers exposed to ETS. It therefore would be implausible to conclude that exposure of an inmate to ETS while in prison constitutes a denial of "the minimally civilized measure of life's necessities" that is "sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson* v. *Seiter*,

111 S. Ct. at 2324 (quoting *Rhodes* v. *Chapman*, 452 U.S. at 347). A smoke-free environment is simply not one of the "basic human needs" to which a prisoner is constitutionally entitled. *Ibid.*[16]

To be sure, a number of state legislatures and local governments have chosen to restrict smoking in public places, and Congress and federal agencies have taken similar steps in certain situations. See Pet. App. C25-C29. But such restrictions are not universal, and "[s]econdary tobacco smoke is common in offices, restaurants, and other public places throughout the United States and the rest of the world." *Steading* v. *Thompson*, 941 F.2d at 500. Moreover, given the extent to which smoking is practiced and tolerated, those restrictions should not be seen as embodying a pervasive condemnation of smoking of the sort that could even plausibily support respondent's Eighth Amendment claim. The restrictions respond in large measure to (and seek to balance) the often *competing* and intensely held positions of smokers and nonsmokers from the standpoint of environmental quality and personal preference, as well as profound *differences* in the importance those two segments of society

[16] The court of appeals sought to avoid this conclusion by fashioning what is essentially a new Eighth Amendment standard: whether the particular condition of confinement (here exposure to ETS) presents an "unreasonable" risk of future harm. That vague standard is unanchored in the text, purposes and judicial construction of the Eighth Amendment, and it would invite a host of novel and broad-ranging judicial challenges to the management of state and federal prisons.

Moreover, even if the new test announced by the decision below were correct, the court of appeals nevertheless erred in suggesting (Pet. App. C21-C25) that the judiciary may determine for itself whether exposure to ETS presents an "unreasonable" risk to an inmate's health for Eighth Amendment purposes, based solely on the statistical likelihood that he will develop an illness. The court would be required to consider whether *society* regards the risk as reasonable, both in general and with particular reference to prisons. *Rhodes* v. *Chapman*, 452 U.S. at 346.

attach to the health risks identified with smoking. And in any event, such regulations have to date essentially carved out exceptions to what has remained a general rule of unregulated smoking (and therefore of unregulated exposure to ETS).[17]

Of course, in many instances, a person who is not incarcerated may be able to avoid exposure to secondary tobacco smoke.[18] Inmates might be less able to do so, because they have less freedom of movement and are not necessarily entitled to be housed where (and with whom) they choose. But people who are not incarcerated are freer than those who are to do many beneficial things. That is one of the advantages that flow from not committing a crime. The fact that incarceration may limit an inmate's ability to avoid exposure to environmental tobacco smoke does not convert an otherwise routine incident of confinement (loss of freedom) into "cruel and unusual" punishment. Compare *Hudson* v. *McMillian*, 112 S. Ct. at 1000 (quoting *Rhodes* v. *Chapman*, 452 U.S. at 347) ("routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society'").

4. Finally, the court of appeals' conclusion that mere exposure to ETS may violate the Eighth Amendment fails

[17] For example, as Amici Hawaii, *et al.*, point out (Br. 12-13), the Ocupational Health and Safety Administration has not to date regulated exposure to ETS in the workplace. It has recently issued a public request for information on that subject, as part of a broader request concerning exposure to indoor pollutants generally. 56 Fed. Reg. 47,892 (1991). See *Action on Smoking & Health* v. *Occupational Safety and Health Administration*, No. 91-1037 (D.C. Cir. Jan. 29, 1992) (sustaining OSHA decision not to issue special standard on ETS in light of request for information on indoor pollutants).

[18] That is not uniformly so: children and other family members, for example, may be effectively unable to avoid exposure to ETS resulting from smoking by other members of their households, and employees may not be able to avoid colleagues who smoke.

to respect the realities of prison administration. Whatever the benefits and costs may be of restricting exposure to ETS in society at large, courts should not assume that the same calculus applies in the vastly different world of prison. Thus, prison administrators reasonably may consider not only the benefits to prisoner health that might flow from a reduction in ETS, but also any adverse effects that might result from efforts to reduce the exposure of nonsmokers to it. Restricting the ability of inmates to smoke could increase the likelihood of unrest and antisocial behavior by prisoners for whom the habit is important. See J.A. 23; cf. *Whitley* v. *Albers*, 475 U.S. at 320.

Even aside from the potential for disruption, prison officials may properly take into account the effect of smoking restrictions on the morale of inmates who want to smoke. See *Steading* v. *Thompson*, 941 F.2d at 500 ("In deciding whether to allow smoking in prison, public officials properly consider both the effects of smoke on nonsmokers and the effects of a ban on those who desire this Faustian pleasure.").[19] In addition, the responsible prison administrator could permissibly conclude that segregation of smokers and nonsmokers might inappropriately elevate that factor over others that prison administrators would regard as equally or more important in classifying and assigning inmates, unduly limit the flexibility needed to run the prison, cause security problems, be unduly expensive, unwisely restrict opportunities for positive interaction among otherwise compatible inmates, and provide opportunities for manipulation by prisoners seeking to move from one cell or unit to another.

For reasons such as these, the Court has often recognized the need to defer to the judgments of officials re-

[19] We have been informed by the Bureau of Prisons that as recently as 1984, it distributed free cigarettes to at least some inmates, both as a technique of institutional management and control and to prevent the development of extortionate practices in connection with the sale of cigarettes among inmates.

sponsible for operating prisons with respect to the details of prison management:

> [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

Procunier v. *Martinez*, 416 U.S. 396, 404-405 (1974) (quoted in *Rhodes* v. *Chapman*, 452 U.S. at 351 n.16).

After considering the relevant factors, the U.S. Bureau of Prisons concluded that it was appropriate to adopt regulations that sharply limit smoking in common areas of federal prisons (except in specially designated smoking locations), and to provide separate housing for smokers and nonsmokers where practical. See 28 C.F.R. 551.160-551.163; see note 14, *supra*. But contrary to the court of appeals' belief (see Pet. App. C28), those regulations do not support its perception of a broad consensus that the standards they embody are *required* by minimum standards of decency to guard against risks to the health of inmates who do not smoke. The regulations' statement of purpose shows that they were designed "[t]o advance towards becoming a clean air environment" as well as "to protect the health and safety of staff and inmates." 28 C.F.R. 551.160(a). Administrators of other prisons might reach a different conclusion and strike a different balance, by pursuing either more stringent or more flexible policies, or by declining to impose prison rules on this area of private inmate conduct.

C. The Subjective Component Of The Eighth Amendment Standard Requires Respondent To Establish Deliberate Indifference To The Adverse Effects Of His Exposure To Environmental Tobacco Smoke

If the Court concludes, contrary to our submission in Point B, that respondent has sufficiently stated a claim insofar as the objective component of the Eighth Amendment standard is concerned, a further inquiry remains. For conditions of confinement can constitute cruel and unusual *punishment* only if the responsible officials "act with a sufficiently culpable state of mind." *Wilson* v. *Seiter*, 111 S. Ct. at 2324. Under *Wilson* v. *Seiter*, the requisite state of mind in this case must be at least one of "deliberate indifference" to the allegedly serious harm, just as it is in cases involving an alleged failure to furnish medical care or other conditions of confinement. *Id.* at 2326-2327. Accord, *Clemmons* v. *Bohannon*, 956 F.2d at 1525-1526, 1528-1529; *Steading* v. *Thompson*, 941 F.2d at 499-500.

Although the magistrate found that respondent had failed to prove deliberate indifference on the part of petitioners to any "serious medical needs" that respondent allegedly was *then* experiencing as a result of his exposure to ETS, she did not separately consider the subjective component in the context of the broader Eighth Amendment principle the court of appeals recognized concerning exposures to levels of ETS that create "unreasonable" risks of *future* harm. See Pet. App. D5-D10. For this reason—and because *Wilson* v. *Seiter* has already resolved the basic question of the state of mind ("deliberate indifference") that must be shown—if the Court does not reverse the judgment of the court of appeals outright, it may wish to remand for the lower courts to consider in the first instance the subjective component of the broader Eighth Amendment claim.

In the proceedings on remand, the Director's recent promulgation of a formal smoking policy, with its re-

strictions on smoking in common areas and provisions for a nonsmoker to request housing with another nonsmoker, might effectively foreclose a finding of deliberate indifference to any concerns respondent still has about the long-term health risks associated with exposure to ETS in prison. Even prior to adoption of that policy, however, the record indicates that officials at the Nevada State Prison (where respondent was previously incarcerated) did attempt to accommodate respondent's requests to avoid being placed with a roommate who smoked, but respondent apparently rejected several alternatives. See Pet. Br. 20-21; DXs F, I-25, I-26, I-32; PXs 2, 6. And it is not clear to what extent respondent based those requests on the possible risks of future harm that the court of appeals found relevant, as distinguished from complaints about the "cold-like" symptoms that he then was allegedly suffering as a result of his exposure to ETS.

Moreover, putting to one side the particular difficulties with respondent's claim on the record of this case, an assessment of the subjective component here would have to take account of the unique setting of a claim based on exposure to ETS. When an Eighth Amendment claim is based on the failure to furnish medical care in response to "serious medical needs" that the inmate is currently experiencing, the State's responsibility to furnish such care "does not ordinarily clash with other equally important governmental responsibilities." *Wilson* v. *Seiter*, 111 S. Ct. at 2326 (quoting *Whitley* v. *Albers*, 475 U.S. at 320). But here, there are countervailing considerations that may properly be balanced against a particular inmate's desire to avoid exposure to ETS. See *ibid.* As Judge Easterbrook has explained:

> No one supposes that restaurateurs who allow smoking are subjecting their patrons to "punishment", or desire to harm them. The guards and administrators who breathe smoky air in the prison are not punishing themselves. No one would suppose, either, that the gentlemen tobacco farmers who wrote

> and adopted the eighth amendment could have conceived of smoke as punishment.
>
> * * * * *
>
> * * * Wardens who resolve the conflict in favor of the inmates who want to smoke could not plausibly be accused of reaching this decision because they hope the smoke will injure other prisoners. * * * Public officials who act *in spite* of an unwelcome consequence of a decision do not "intend" that consequence for constitutional purposes. See *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 * * * (1979).

Steading v. *Thompson*, 941 F.2d at 500.

Thus, even if an inmate explicitly brought the medical risks identified by the court of appeals to the attention of prison officials, a decision by prison officials declining to transfer the inmate to a cell where he would not have a smoker as a roommate (because of sound interests of prison administration that weigh against that course), the officials could not fairly be accused of "deliberate indifference" to the concerns the inmate raised. These difficulties in applying the subjective component of the Eighth Amendment standard to the novel claim endorsed by the court of appeals strongly reinforce our submission in Point B that respondent cannot satisfy the objective component based on mere exposure to the environmental tobacco smoke that results from smoking by other inmates.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1992

APPENDIX

STATE OF NEVADA
DEPARTMENT OF PRISONS
OFFICE OF THE DIRECTOR

MEMORANDUM

DATE: January 10, 1992

TO: ALL WARDENS AND MANAGERS
FROM: RON ANGELONE, DIRECTOR
SUBJECT: SMOKING POLICY

ADMINISTRATIVE DIRECTIVE #53-92
(supersedes A.D. 24-91)

Smoking in program, food preparation/serving, recreational and medial areas is restricted to those areas specifically designated for that purpose. These areas include, but are not limited to, classrooms, libraries, gymnasiums, chapels, culinary's, industries and infirmaries.

Smoking by inmates and/or staff is strictly prohibited during meetings (i.e., staff meetings, training, inmate treatment groups) and during individual inmate counseling/treatment sessions, medical and/or mental health encounters. Employees/inmates are not allowed to smoke in offices shared by others unless every individual in the office agrees to allow smoking.

It is the responsibility of the respective Wardens to designate smoking areas for staff and inmates, consistent with the requirements outlined above. The Assistant Director/Support Services, with the approval of the Director, shall designate smoking areas in Central Office-North. The

Assistant Director/Prison Industries, with the approval of the Director, shall designate smoking areas in Central Office-South.

Contingent upon space availability, Wardens may further designate non-smoking sections in inmate dormitory settings. Reasonable efforts may be made by the institutional classification committees to accommodate non-smokers in double bunked housing areas. Non-smoking inmates who wish to be housed with another non-smoking inmate are to provide a written request to the Associate Warden Programs/Facility Manager. As with any incompatible inmate living situation, accommodations will be made as necessary, consistent with security considerations and space availability.

/s/ Ron Angelone
RON ANGELONE, Director
NEVADA DEPARTMENT OF PRISON

INMATE ACCESS

YES: xx
NO:

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 60029

Supreme Court, U.S.
FILED
AUG 27 1992
OFFICE OF THE CLERK

No. 91-1958

In The

Supreme Court of the United States

October Term, 1992

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,

Petitioners,

vs.

WILLIAM MCKINNEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WEST VIRGINIA, WISCONSIN, AND WYOMING, THE DISTRICT OF COLUMBIA, THE COMMONWEALTH OF PUERTO RICO, AND THE TERRITORIES OF AMERICAN SAMOA, GUAM, AND THE VIRGIN ISLANDS IN SUPPORT OF PETITIONERS

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No. 91-1958

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INTEREST OF AMICI CURIAE

This Court has recognized that "[p]rison administrators [] should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their

judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). The amici States and other governmental units thus have a significant interest in seeing that their authority to manage and operate their prison and jail facilities in the most efficient manner consistent with legitimate security concerns not be unduly hampered by court-imposed orders requiring them to either ban smoking in prison or segregate prisoners according to their smoking or non-smoking tastes. Serious security problems could arise under either scenario, as a complete ban may disturb many smoking prisoners, making them more prone to violence, while attempting to segregate inmates according to smoking status could require ignoring important security concerns in assigning prisoners to cells or larger cellblocks.

Furthermore, the amici have a very significant interest in reducing the immense costs of building and operating prisons and jails within their States. The decision below, if allowed to stand, would likely lead to even greater drains on governmental treasuries as segregating prisoners according to their smoking preferences would require either new prison facilities or extensive renovations. A complete ban on smoking would require more medical personnel to treat addicted smokers suffering withdrawal symptoms and/or more prison guards and other staff to deal with the likely increase in prison unrest.

SUMMARY OF ARGUMENT

1. The Ninth Circuit's judgment on remand, fairly stated, simply disobeyed the mandate of this Court in *Helling v. McKinney*, 112 S. Ct. 291 (1991), which directed

the Court of Appeals to give "further consideration" to this case "in light of *Wilson v. Seiter*, 111 S. Ct. 2321 (1992)." In granting a directed verdict, the Magistrate found "[t]here was no evidence presented of personal involvement by any of the Defendants," nor "any indication that any of the Defendants intentionally chose to inflict harm upon the Plaintiff." Pet. App. D-8. These rulings, not seriously challenged by Plaintiff or the Court of Appeals, mandated affirmance under the test announced in *Seiter*, namely, whether Defendants were "deliberately indifferent" to the known risks of Environmental Tobacco Smoke ("ETS") at the Nevada prisons in general, or in McKinney's case in particular. Showing improper intent was Plaintiff's burden, and Plaintiff failed in his burden of proof. Rather than remanding to the District Court for a new trial, the District Court's directed verdict should have been upheld. *Cf. Whitley v. Albers*, 475 U.S. 312 (1986) (upholding directed verdict on Eighth Amendment claim). *See generally Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (on the standards under Fed. R. Civ. P. 50 in general).

2. Involuntary exposure to ETS, either in general, or in the facts of McKinney's case, does not constitute an Eighth Amendment violation, irrespective of Petitioners' knowledge of the relevant scientific literature dealing with ETS risks. As the Tenth Circuit has observed, prisoners who are involuntarily exposed to passive smoke suffer "no adverse physical symptoms . . . different from those suffered by everyone in society." *Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992) (en banc). "[D]ebate persists about how severe the effects of secondary smoke may be," *Steading v. Thompson*, 941 F.2d 498 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992), and

even the Surgeon General's reports are – *at the level of analysis required for an Eighth Amendment claim* – wholly inconclusive of whether exposure to ETS, either in general, or in McKinney's case, constitutes punishment that is indisputably "cruel and unusual under contemporary standards." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Nevada was simply not required on the facts here to honor McKinney's desire for a new cellmate.

ARGUMENT

I. The Ninth Circuit Not only Erred, but Disobeyed the Mandate, in Refusing to Affirm the Judgment in Favor of Petitioners Based Upon the Requirement of "Deliberate Indifference," as Defined in *Wilson v. Seiter*, 111 S. Ct. 2321 (1991).

Upon granting the Nevada prison officials' prior petition for certiorari, this Court summarily vacated the previous judgment of the Ninth Circuit, and remanded "for further consideration in light of *Wilson v. Seiter*, 501 U.S. ___ (1991)." *See Helling v. McKinney*, 112 S. Ct. 291 (1991). This mandate indicates that *Seiter* was "sufficiently analogous, and perhaps, decisive, to compel a reexamination of the case." *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam). The mandate therefore "contemplated that the [court of appeals] would consider, whether, as a matter of federal law, [the court's directive for a new trial] could stand in light of [*Seiter*]." *Yates v. Aiken*, 484 U.S. 211, 215 (1988). The Ninth Circuit's decision below simply "did not decide this question," *id.*, and the proper disposition on this writ is a reversal with

instructions to the Ninth Circuit to affirm the trial court judgment.

Wilson v. Seiter, 111 S. Ct. 2321 (1991), established that adverse prison conditions that "involve the serious deprivation" that could constitute "cruel and unusual punishment," as defined in *Rhodes v. Chapman*, 452 U.S. 337 (1981), must be inflicted by the relevant official with a requisite "state of mind" before that official may be called upon to remedy the condition under the compulsion of the Eighth Amendment. That "state of mind" is "deliberate indifference," *Seiter*, 111 S. Ct. at 2326-27, and it was this "state of mind" test that the Court of Appeals was required to apply to the record before it on the remand which this Court directed in its summary disposition in No. 91-969.

Instead, the Ninth Circuit simply noted that *Seiter* adds "a subjective component," and remanded, *despite* the fact that the Magistrate had "directed a verdict on the issue of defendants' deliberate indifference to McKinney's serious existing medical symptoms." *McKinney v. Anderson*, 959 F.2d 853, 854 (9th Cir. 1992). The Ninth Circuit justified its approach on the basis that "indifference to current medical problems is distinct from indifference to the problem of involuntary, long term exposure to unreasonable levels of ETS." *Id.* Even assuming this is true, however, the panel was simply unresponsive to the mandate and to *Seiter* in general, in that McKinney had already made his record in the District Court on this issue, and that record was (and remains) wanting as a matter of law. The Magistrate ruling on the motion for directed verdict found that McKinney had fully failed in carrying his burden of showing that "prison officials have

been deliberately indifferent to a threat against the inmate," by "intentionally expos[ing] him to a known risk or harm [that was] actually intended to harm him." Pet. App. D-6. As the District Court found, "[t]here was no evidence presented of personal involvement by any of the Defendants, nor . . . was there any indication that any of the Defendants intentionally chose to inflict harm upon the Plaintiff." *Id.* at D-10.

These findings were not controverted by the Ninth Circuit under the relevant standard, nor could they be. A motion for a directed verdict, like a motion for summary judgment, *must* be granted unless the finder of fact "could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the existing law *or* that he did not." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). When, as here, there is "no factual basis" for even a potential conclusion that Petitioners were "deliberately indifferent" to any known risks from ETS, the court of appeals ought to have affirmed rather than remanded for further proceedings below. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). This case was at trial, and Plaintiff was required to bear "the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 110 S. Ct. 2130, 2136 (1992). Respondent utterly failed in this regard, and the verdict should stand.

That this is true can be seen by the "manner and degree of evidence" that might well have met Plaintiff's burden. Assuming, *arguendo*, that constant exposure to ETS emanated by the combustion of five packs of cigarettes per day in a six-foot by eight-foot room could meet

the objective requirement for an Eighth Amendment violation, *cf.* 924 F.2d at 1507, it would at the least be necessary that the specific defendants in this case know, for a fact, that McKinney would involuntarily spend all his time in his cell, that McKinney's cellmate in fact customarily would smoke five packs of cigarettes per day, and that nothing McKinney could do by way of moral suasion could prevent the smoking. Beyond this, however, McKinney would also have to show that each specific Defendant sought to be enjoined here in fact knew of the precise risks that could make ETS exposure of this nature "cruel and unusual" in any objective sense. In fact, as the Tenth Circuit ruled in its *en banc* determination in *Clemmons v. Bohannon*, 956 F.2d 1523 (10th Cir. 1992):

> . . . If plaintiff had shown or even alleged that defendants forced him to live with others who smoked and that they did so *intentionally*, knowing the smoke would have serious medical consequences for *him*, a different result might obtain.
>
> . . . Clemmons was required to present facts that would allow a reasonable fact finder to conclude that the defendants knew of the dangers of ETS and deliberately exposed him to it.

956 F.2d at 1528 (emphasis supplied).

No such proof, however, was supplied to the District Court, nor, for that matter, has Respondent ever suggested that there even exists such proof. It was for this reason, no doubt, that this Court vacated and remanded to the court of appeals for what ought to have been a straightforward disposition under *Seiter*. This Court does not customarily send cases on "brief round trip[s] to the

courts below," *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447 (1988), and it was error for the Ninth Circuit to prolong the proceedings. The judgment on remand should be reversed, and the directed verdict of the District Court rejecting Respondent's Eighth Amendment claims reinstated pursuant to *Wilson v. Seiter, supra*.

II. The Mere Possibility that Forced Exposure to Levels of Secondhand Smoke Will Lead to Cancer or other Disease at Some Unspecified Time in the Future Does Not Satisfy the Objective Component of a Cruel and Unusual Punishment Claim.

Even assuming that the Nevada prison officials harbored a "deliberate indifference" to the risks of ETS, either in general, or in McKinney's specific situation, McKinney's claim does not satisfy the "objective component" of an Eighth Amendment violation. *See Hudson v. McMillian*, 112 S. Ct. 995 (1992). The Ninth Circuit's original judgment, as reinstated by its ruling on remand, unduly expands the Eighth Amendment beyond the scope of this Court's precedents, and should therefore be reversed.

The starting point for discussion in this case must be the undeniable fact that there are many environmental factors which produce latent risks of injury or disease, yet this Court has never held that the Eighth Amendment requires these factors to be eliminated or reduced. Indeed, affirming the judgment of the Ninth Circuit in this case will open a Pandora's box, out of which will

spring endless numbers of complaints over environmental, nutritional, or programmatic conditions at the Nation's prisons, each masking as a claim for violation of the Eighth Amendment's limited ban on "cruel and unusual punishment."

The range of analogous claims is vast. In the South and Hawaii, inmates may well complain that mandated exercise programs expose prisoners to too much ultraviolet radiation, risking melanoma or other skin disorders. In the North, prisoners might complain that shoveling snow on a winter work detail too likely risks back injury, or heart attack. Everywhere, prison diets that feature too much cholesterol, too few poly-unsaturated fats, not enough vegetables, or some other deficiency which medical science confirms is linked to cancer, heart disease, or stroke, would come under scrutiny in federal court under the guise of claims challenging conditions as breaching the Eighth Amendment. Indeed, the severe depressive effects of prison itself, which undoubtedly flow from the loss of companionship, contact with family, church, and the community as a whole, arguably affect longevity, and threaten latent risk of disease or death.

While the amici States concur with the longstanding view of the Surgeon General that an inmate's *own* smoking habit is a danger to his or her *own* physical health, the evidence of risk associated with ETS does not lead to the conclusion that States must take action to set up "no smoking" areas in their prisons.

Indeed, the Surgeon General's 1986 Report, *The Health Consequences of Involuntary Smoking* (U.S. Dep't of Health & Human Services 1986), is, for purposes of Eighth Amendment standards, sufficiently equivocal that those government entities that run prisons and jails should not even face the sort of litigation contemplated by the panel below. For example, while the Surgeon General concludes that "[i]nvoluntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers," *id.* at vii, the Report also states that "[r]isk associated with involuntary smoking exposure is uncertain," and "[i]mportant questions related to (ETS) exposure require further research," as "[m]ore accurate estimates for the assessment of exposure in the home, workplace, and other environments are needed." *Id.* at 101. In fact, "little is known about the magnitude of the (ETS) exposures that occur in different segments of the U.S. population," and "[a] better understanding of the exposures that are actually occurring in the United States, and of past exposures, would be needed to accurately assess the risk for the U.S. population." *Id.* at 96-97. In short, as the report states, "[t]here are no studies of acute respiratory illness experience in adults exposed to environmental cigarette smoke." *Id.* at 60.

As to specific disease-risks associated with ETS, the Surgeon General's Report was notably cautious in its findings. According to the Report, "[t]he physiological and clinical significance of the small changes in pulmonary function found in some studies of adults remains to be determined," as "[t]he small magnitude of effect implies that a previously healthy individual would not

develop chronic lung disease solely on the basis of involuntary tobacco smoke exposure in adult life." *Id.* at 62. Likewise, "[s]tudies of large numbers of individuals with measurement of the relevant physiologic exposure parameters will be necessary to adequately address the effects of environmental tobacco smoke exposure on asthmatics." *Id.* at 65. Indeed, the Surgeon General wrote that "[t]here has been relatively little systematic evaluation of policies restricting smoking in public places or at the workplace." *Id.* at 16.

Against this backdrop, the Ninth Circuit was quite wrong to impose the Surgeon General's recommendations as a matter of Eighth Amendment mandate – a mandate which not even Congress can change despite the manifest policy considerations inherent in no-smoking policies, or other forms of regulation of the tobacco industry. *See Cippolone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703 (U.S. June 24, 1992) (narrowly applying Congress' preemptive statements in the cigarette advertising field); *id.* at 4710 (Blackmun, J., joined by Kennedy, J., and Souter, J.) (describing Court's opinion on state tort claims seeking recovery for injury to smokers as a "compromise" between pro- and anti-smoking positions). Contrary to the Ninth Circuit's judgment, States should be free to set their own course for their prisons with respect to smoking. Indeed, as the Ninth Circuit observed, "[n]ationwide, the proportion of smokers in prisons is 90 percent." 924 F.2d at 1507 n.21. In the face of this large majority, and the unrest flat bans on smoking produce in the prison environment, States may well choose to balance the competing harms by allowing smoking in their prisons, either in all places, or in some, or at particular times. The State and

federal Courts should not be permitted,at least not under this Court's Eighth Amendment jurisprudence, to mandate no-smoking cellblocks, or otherwise interfere with that balancing process.

The aberrant nature of the Ninth Circuit's judgment is confirmed by analysis of the federal Government's own regulatory efforts with regard to ETS. Thus, while the Surgeon General has drawn from what evidence exists the conclusion that exposure to ETS increases health risks, the Surgeon General has no authority to regulate smoking other than by moral suasion. The one federal agency that does possess that power is the Occupational Safety and Health Administration (OSHA) in the United States Department of Labor. Not only has OSHA not yet adopted the Surgeon General's conclusions, in a recent regulatory action the agency declined to issue a temporary standard limiting ETS exposure in the workplace, finding that ETS did not constitute a "grave danger" of the sort that must be present to justify such an extraordinary standard. The Court of Appeals for the District of Columbia Circuit upheld OSHA's determination in an unpublished opinion. *Action on Smoking and Health v. Occupational Safety and Health Administration*, 1991 U.S. App. LEXIS 10487 (D.C. Cir. May 10, 1991). Only within the past year has OSHA even issued a Request for Information on Occupational Exposure to Indoor Air Pollutants, 56 Fed. Reg. 47892 (Sept. 20, 1991), which seeks information on all indoor pollutants, including ETS. In this request, OSHA estimates that of the approximately 70% of Americans who do not smoke, up to 77% of them, roughly 75 million Americans, are regularly exposed to ETS at work. *See* 56 Fed. Reg. at 47892-93. It is for this

reason that OSHA is only studying the "major issues which the Agency needs to consider in determining whether regulatory action is appropriate and feasible to control health problems related to indoor air quality." *Id.* Such statements simply cannot be squared with the Ninth Circuit's conclusion that ETS in prisons and jails across the United States is "cruel and unusual punishment."

The Ninth Circuit's reliance on no-smoking bans or limits in public places for its conclusion that "unwanted exposure to ETS may amount to a violation of 'society's evolving standards of decency,' " is logically misplaced, and untenable in light of this Court's Eighth Amendment jurisprudence. To be sure there may be many facets of public life, which, if unregulated, are unpleasant – or sufficiently risky – to enough of the population that regulation, under the police power, is undertaken. But the mere fact of police power regulation of smoking *outside* of prisons does not mean that "society's evolving standards of decency" mandate analogous regulation *inside* the prison. In fact, taken seriously, the Ninth Circuit's logic, if extended to its ultimate conclusion, would make any public refusal to mandate for itself the harsh features of prison life significant proof that prison life itself is "cruel and unusual." This, of course, is not the law. For while a prison environment free of involuntary confinement with chain-smoking cellmates might "reflect an aspiration toward an ideal environment for long-term confinement," the Constitution does not mandate comfortable prisons." *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981). *Compare Wilson v. Seiter*, 111 S. Ct. at 2327 (upholding dismissal of claims attacking inadequate air conditioning, housing

with mentally-ill inmates, and overcrowding). This logic requires reversal, and reinstatement of the verdict.

As both the Seventh and Tenth Circuits have recently, and unequivocally, held, whatever else the Eighth Amendment might proscribe, it does not reach the risk-enhancement present by environmental tobacco smoke. Prisoners who are involuntarily exposed to passive smoke, in this sense, suffer "no adverse physical symptoms . . . different from those suffered by everyone in society." *Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992) (en banc). As the Seventh Circuit has agreed, "debate persists about how severe the effects of secondary smoke may be." *Steading v. Thompson*, 941 F.2d 498, 500 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992). This fact, alone, negates any Eighth Amendments claim, for the Cruel and Unusual Punishments Clause responds to conditions that are indisputably "cruel and unusual under contemporary standards." *Rhodes*, 452 U.S. at 347. Involuntary exposure to ETS, at least on the facts presented here, simply does not meet this test.

Nevada, of course, may well be obligated to treat prisoners who develop illnesses, whatever their source, including those that may result from secondary smoke inhalation, just as it must treat heart disease, stroke, arthritis, cancer, or a number of other illnesses that may be triggered by prison life. Indeed, in this case, McKinney voiced complaints, and the District Court found that the Nevada officials were not deliberately indifferent to his medical needs. *See* Pet. App. D-7-D10. But Nevada is not obligated to eliminate risks – such as exposure to secondary smoke – which, while undoubtedly unpleasant, and, even, perhaps "harsh," *see* 452 U.S. at 347, do not violate contemporary standards defining

punishment that is cruel and unusual. The Ninth Circuit's decision remanding this case is error, and should be reversed.

CONCLUSION

For the reasons stated above and by the Petitioners, the judgment of the Court of Appeals should be reversed, and the cause remanded with instructions to reinstate the directed verdict for Defendants on Respondent's Eighth Amendment Claim.

Dated: Honolulu, Hawaii, August 27, 1992.

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INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of nearly 300,000 members, dedicated to preserving and protecting the Bill of Rights. The American Civil Liberties Union of Nevada is one of the ACLU's state affiliates. The ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of prisoners. Thus, the ACLU has a particular interest in the standard to be applied to claims by prisoners that they have been subjected to cruel and unusual punishment in violation of the Eighth Amendment.

The parties have agreed to the filing of this brief, as indicated by their letters of consent filed with the Clerk of this Court.

STATEMENT OF THE CASE

The respondent, a Nevada state prisoner, filed this action under 42 U.S.C. §1983, challenging his involuntary exposure to environmental tobacco smoke (ETS) at the Nevada State Prison in Carson City. Respondent sought damages and injunctive relief, contending that he was forced to double cell with a prisoner who smoked five packs of cigarettes per day and that, despite his repeated complaints to prison officials, he was not moved to another cell. See Joint Appendix (hereinafter "J.A.") at 6.

The magistrate before whom the case was tried viewed the case as stating two Eighth Amendment claims: (1) whether the prison officials were deliberately indifferent to the respondent's then-existing medical symptoms, and (2) whether the respondent had a constitutional right to be housed in a smoke-free environment. After excluding evidence relevant to the potential health

effects of exposure to ETS, the magistrate directed a verdict for petitioners on both claims. See J.A. at 72-73.

The court of appeals affirmed in part and reversed in part, holding that the magistrate should have allowed respondent to attempt to show that he was entitled to injunctive relief on the claim that he was involuntarily exposed to a level of ETS that posed an unreasonable risk of harm to his health. The court of appeals affirmed the district court's dismissal of the damages claim and all other claims for injunctive relief. McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991).

This Court vacated the judgment and remanded to the court of appeals for further consideration in light of the intervening decision in Wilson v. Seiter, 111 S.Ct. 2321 (1991). Helling v. McKinney, 112 S.Ct. 291 (1991), as amended, 112 S.Ct. 963 (1992). On remand the court of appeals reinstated its

previous judgment remanding the injunctive claim on the issue of unreasonable risk of harm. The court of appeals noted that its previous opinion dealt with the objective component of the Eighth Amendment. On remand, the court of appeals directed the district court to consider whether respondent had shown a violation of the subjective component of the Eighth Amendment. To do so, respondent would be required to show deliberate indifference under the standard established in Wilson v. Seiter. See McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992). The petitioners sought certiorari and this Court granted the writ on June 29, 1992.

The respondent has been transferred from the Nevada State Prison and is currently single celled in another facility. In January, 1992, the Nevada Department of Prisons adopted a formal smoking policy that substantially limits smoking and requires

reasonable efforts to accommodate non-smokers in double celled housing areas. See brief of the United States, Appendix. These factual changes have not been considered by the lower courts.

SUMMARY OF ARGUMENT

The only issue before this Court is whether the respondent prisoner should be given an opportunity on remand to demonstrate that he is entitled to an injunction limiting his involuntary exposure to ETS by prison officials. The respondent has been transferred from the Nevada State Prison and is now single celled in another Nevada prison. In addition, subsequent to the first decision of the court of appeals, the Nevada Department of Prisons promulgated a system-wide policy that substantially restricts smoking and provides for efforts to accommodate the housing needs of non-smoking prisoners.

These changes in the facts are highly relevant to whether injunctive relief is appropriate; however, they have never been considered by a lower federal court. For these reasons, this Court should not decide this case on the merits, but should dispose of this case in a manner that allows these new facts to be considered on remand.

If this Court considers the case on its merits, it should affirm the judgment of the court of appeals. The court of appeals correctly remanded this case to allow the respondent to attempt to demonstrate that ETS posed an unreasonable risk to his health, and that the petitioners were deliberately indifferent to that risk. Contrary to the petitioners' argument, the pretrial order in this case framed the issues in a manner consistent with the court of appeals' directions on remand to consider the risk of harm from ETS. In addition, the court of appeals correctly instructed the district

court that the respondent was required to prove the petitioners' deliberate indifference under Wilson v. Seiter, 111 S.Ct. 2321 (1991).

This Court has repeatedly recognized that, when the State takes an individual into involuntary custody, including penal custody, it assumes a corresponding duty to protect the individual's safety. This duty implies an obligation to protect against unreasonable risks of harm. Many kinds of catastrophic harms, such as fire and contagious disease, involve potential harm. For this Court to hold that the Eighth Amendment does not protect prisoners from potential harm, as urged by petitioners, would require a dramatic break with precedent. Instead, this Court should recognize that exposing prisoners to substantial risks of serious harm constitutes cruel and unusual punishment.

The additional arguments of the

petitioners are unpersuasive. The fact that some non-prisoners voluntarily engage in dangerous behavior does not mean that prisoners can be involuntarily exposed to such dangers without offending the Eighth Amendment. In this regard, prisoners and non-prisoners are not similarly situated because the State has an affirmative duty to protect the safety of prisoners, but has no such duty toward non-prisoners.

Finally, the petitioners exaggerate the effects of affirming the decision of the court of appeals. The decision below does no more than allow the respondent an opportunity to present his claim on the merits. In view of the high threshold that this Court has established for demonstrating a violation of the Eighth Amendment, there is no danger that prison officials will be required to protect against nonsignificant threats to prisoner health or safety.

ARGUMENT

I. THIS CASE SHOULD BE REMANDED FOR THE LOWER COURTS TO DETERMINE THE EFFECTS OF RECENT FACTUAL DEVELOPMENTS

The facts of this case have changed fundamentally since the court of appeals issued its first opinion. Respondent, who filed this lawsuit because he was double celled with a heavy smoker at the Nevada State Prison, has been transferred to Ely State Prison, where he is now housed in a single cell. See brief of United States supporting petitioners at 12 n. 6. Indeed, respondent has apparently not been assigned to the Nevada State Prison since early 1991. See respondent's brief in opposition to petition for certiorari at 5.[1] Moreover, four of the five petitioners apparently have responsibilities only at the Nevada State Prison, and have no connection with Ely State

[1] There is no indication in either opinion of the court of appeals that that court was aware of this fact.

Prison. See J.A. at 1-4, 16-17; brief of petitioners at 1.

Respondent does not challenge in this Court the district court's finding, affirmed by the court of appeals, that petitioners did not act with deliberate indifference to his then-existing medical symptoms. See McKinney v. Anderson, 924 F.2d 1500, 1511 (9th Cir. 1991). Nor does he challenge the holding of the court of appeals that he is not entitled to damages. Id. at 1509. Thus, all that remains of this case is respondent's request for an injunction prohibiting petitioners from housing him with prisoners who smoke. See brief of United States at 11. Since respondent is now and has for some time been housed in a single cell at a different prison, this claim may well be moot.[2]

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[2] Since his transfer to Ely, respondent has been temporarily housed at the Nevada State Prison on three occasions, apparently in connection with several lawsuits filed by respondent that are pending in the United States District Court at Reno. These (continued...)

In addition, the court of appeals issued its decision in the context of a prison where smoking was virtually unregulated. See 924 F.2d at 1507. However, on January 10, 1992, the Director of the Nevada Department of Prisons promulgated a system-wide policy that substantially restricts smoking by prisoners and staff, and provides for efforts to accommodate the housing preferences of non-smoking prisoners. See brief of United States, Appendix.

These developments substantially change the complexion of this case, and, as the

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[2](...continued)
temporary retransfers to the Nevada State Prison have apparently lasted approximately three weeks each. However, on none of these occasions has respondent been double celled with a prisoner who smoked in the cell. On the first two occasions, respondent was housed in a single cell. On the third, he was double celled for two days with a prisoner who sometimes smokes; however, consistent with their recently promulgated smoking policy (see brief of United States, Appendix), correctional officials asked this prisoner not to smoke while housed with respondent, and he acceded to their request.

United States points out, impart to it "a decidedly abstract quality." Brief of United States at 12. There are several appropriate courses of action in light of these circumstances. First, the Court could affirm. This would reinstate the order of the court of appeals, and thus allow the district court on remand to consider the effects of the changed facts. Second, this Court could vacate the decision of the court of appeals and remand for that court to consider the changed circumstances. Finally, this Court could dismiss the writ of certiorari as improvidently granted. This would leave standing the decision below remanding the case to the district court, which would give that court the first opportunity to consider the effect of these factual developments.

II. THE COURT OF APPEALS PROPERLY REMANDED THIS CASE TO THE DISTRICT COURT TO ALLOW RESPONDENT TO SHOW AN UNREASONABLE RISK OF HARM TO HIS HEALTH AND DELIBERATE INDIFFERENCE ON THE PART OF PETITIONERS

A. The District Court Did Not Allow Respondent to Present Evidence on the Long-Term Risks to His Health from Exposure to ETS

In remanding this case, the court of appeals noted that the district court had "excluded evidence that did not relate to McKinney's current medical symptoms, including documentation of the potential health effects of exposure to ETS." McKinney, 924 F.2d at 1503. Petitioners argue that this issue was voluntarily excluded by the parties themselves in framing the proposed joint pre-trial order. Brief of petitioners at 47. However, one of the issues to be tried, agreed upon by the parties, was "[h]as McKinney's health been injured by exposure to cigarette smoke, and,

if so, to what extent?" J.A. at 52. This language can certainly be read to include not only harm to respondent's health that is currently causing symptoms, but also harm that has occurred but is not yet apparent.[3]

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[3] The development of cancer is a multi-step process; physical changes may be entirely undetectable prior to the development of the malignancy. See U.S. Department of Health and Human Services, The Health Consequences of Involuntary Smoking 28 (1986):

> Carcinogenesis refers to the process by which a normal cell is transformed into a malignant cell with uncontrolled replication. Carcinogenesis has been conceptualized as a multistage process involving a sequence of alterations in cellular DNA that terminate with the development of a malignant cell. Agents acting early in this sequence are referred to as initiators; those acting later are referred to as promoters. Compounds with both initiating activity and promoting activity have been identified in tobacco smoke.
>
> Carcinogenesis reflects DNA damage; although some repair may take place, biological models have not suggested that there is a threshold of damage that must be exceeded. Rather, carcinogenesis

(continued...)

In the district court respondent, acting pro se, moved for a subpoena to produce at trial an expert witness to testify as to the effects on a non-smoker of close confinement with a heavy cigarette smoker. Appendix to petition for certiorari, No. 91-269, E-1 - E-3. The district court denied that motion. Id. at F-6. Respondent then moved, pursuant to Fed. R. Evid. 706, for appointment of an environmental toxicologist as an expert witness to testify regarding the risks to respondent's health from being housed "in an 8' x 6' room, without ventilation, with a heavy cigarette smoker." Id. at G-1 - G-6. Respondent had located a professor at the University of Nevada School of Medicine who

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[3](...continued)
> has been considered to involve a series of changes, each occurring at a rate dependent on the dose of a damaging agent. Higher doses increase the probability that the entire sequence will be completed, but lower doses may also lead to malignancy.

was apparently willing to act as an expert witness, but respondent stated that he was unable to pay the witness' fees and expenses because he was indigent. Id. The district court denied this motion also. Id. at H-6. As a result, the only witnesses testifying for respondent at trial were his fellow prisoners at the Nevada State Prison. J.A. at 59-60, 66-67, 69-70.

At trial, respondent attempted to introduce into evidence medical literature and other publications regarding the health effects of cigarette smoke. J.A. at 71. The district court refused to admit these materials. Id. at 72-73. The district court then directed a verdict in favor of petitioners. Id. at 73.

Thus, the district court improperly deprived respondent of any opportunity to present evidence of the long-term risks to his health posed by his exposure to ETS, although it was within the scope of the

issues to be tried. Neither respondent nor his prisoner witnesses could testify on this subject, and respondent was not permitted to introduce documentary evidence on the health effects of ETS. For this reason, the court of appeals properly remanded the case to the district court to allow respondent "to present evidence regarding the level and degree of his exposure to ETS and whether that degree of exposure is sufficient to create an unreasonable risk of harm to his health." McKinney, 924 F.2d at 1509.

B. The District Court Did Not Consider Whether Petitioners Were Deliberately Indifferent with Regard to the Long-Term Risks of Respondent's Exposure to ETS

The district court found that respondent had failed to prove that petitioners had acted with deliberate indifference to his then-existing medical symptoms, and the court of appeals affirmed that ruling. McKinney, 924 F.2d at 1511. However, as the United

States points out, the district court did not separately consider whether petitioners were deliberately indifferent with regard to the long-term risks posed by respondent's exposure to ETS. Brief of United States at 25.

In connection with this issue, it is important to note that the district court considered the case before this Court decided Wilson v. Seiter, 111 S.Ct. 2321 (1991). In Wilson, this Court held that establishing an Eighth Amendment violation requires proving both a subjective and an objective component. For conditions of confinement claims, the subjective component of an Eighth Amendment claim requires a showing of deliberate indifference. The district court, acting without the guidance of Wilson, appears to have misapplied the deliberate indifference standard.[4] Thus, the appropriate disposition

[4] It appears that the district court erroneously believed that a showing of deliberate indifference requires that prison officials actually intend to harm the (continued...)

of this case is a remand to the district court for further proceedings in light of Wilson.[5] Because the court of appeals remanded the case to the district court for

[4](...continued)
prisoner. See, e.g., Order Entering Judgment in Favor of Defendants, October 18, 1989, appendix to petition for certiorari, No. 91-1958, at D-6 ("plaintiff must show that the prison officials intentionally exposed him to a known risk or harm and actually intended to harm him") (citing Gorman v. Moody, 710 F. Supp. 1256, 1260 (N.D. Ind. 1989)); D-10 ("nor ... was there any indication that any of the Defendants intentionally chose to inflict harm upon the Plaintiff").

Since the district court's decision, this Court has clearly distinguished the "deliberate indifference" test from the standard articulated in Whitley v. Albers, 475 U.S. 312, 320-321 (1986), which requires that prison officials act "for the very purpose of causing harm." Wilson, 111 S.Ct. at 2326. Therefore, this case should be remanded to the district court for the correct application of the deliberate indifference test to respondent's claim regarding long-term risks from exposure to ETS.

[5] The United States similarly suggests that the Court "may wish to remand for the lower courts to consider in the first instance the subjective component" of respondent's claim. Brief of United States at 25.

this purpose, affirming the judgment below would accomplish that goal. See McKinney, 959 F.2d at 854.

The United States suggests that a finding of deliberate indifference may be foreclosed by petitioners' recent promulgation of a formal smoking policy, and their alleged attempts to accommodate respondent's requests that he not be housed with a smoker. Brief of United States at 25-26. The determination of whether petitioners' attempted accommodations were adequate to foreclose a finding of deliberate indifference is a highly fact-specific one, which necessarily turns on the gravity of the risk that respondent was facing. Moreover, evaluation of the accommodations cannot be divorced from consideration of the security and other administrative concerns raised by petitioners. See Wilson, 111 S.Ct. at 2326 (evaluation of state of mind "depends upon the constraints facing the official") (emphasis

omitted). For these reasons, the bearing of petitioners' attempted accommodations on the issue of deliberate indifference is best considered on remand to the lower courts.[6]

III. EXPOSURE OF PRISONERS TO LEVELS OF ENVIRONMENTAL TOBACCO SMOKE THAT PRESENT AN UNREASONABLE RISK OF HARM CAN CONSTITUTE THE OBJECTIVE COMPONENT OF AN EIGHTH AMENDMENT CLAIM

A. The Right to Personal Safety under the Eighth Amendment Includes Protection from Unreasonable Risks of Harm

The starting point of this Court's review should be the actual holding of the court of appeals below. That court did not hold, as petitioners and their amici imply, that prisoners are entitled to a smoke-free environment, or that occasional exposure to ETS violates the Constitution. Rather, the court of appeals held that "it is cruel and unusual punishment to house a prisoner in an

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[6] The United States appears to agree. Brief of United States at 26.

environment that exposes him to levels of ETS that pose an unreasonable risk of harming his health...." McKinney, 959 F.2d at 854.[7]

The only alternative to the holding of the court of appeals is a per se rule that compelled exposure to ETS, regardless of the intensity and duration of such exposure and the likelihood that it will cause future harm, can never violate the Eighth Amendment absent immediately detectable medical consequences. Petitioners urge this Court to adopt such a rule. See, e.g., brief of petitioners at 8, 18-19, 43. However, this would represent a dramatic break with precedent.

This Court has recognized that "when the State takes a person into its custody and holds him there against his will, the

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[7] See also McKinney, 924 F.2d at 1504 ("compelled exposure to ETS is ... cruel and unusual punishment if it is at such levels and under such circumstances as to pose an unreasonable risk of harm to an inmate's health").

Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." DeShaney v. Winnebago County DSS, 109 S.Ct. 998, 1005 (1989), citing Youngberg v. Romeo, 457 U.S. 307, 317 (1982). In Youngberg, the Court recognized the existence of a constitutional "right to personal security" that is "not extinguished by lawful confinement, even for penal purposes," and thus acknowledged that "it is cruel and unusual punishment to hold convicted criminals in unsafe conditions." 457 U.S. at 315-316.[8]

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[8] The courts of appeals have uniformly recognized this proposition. See, e.g., Bibbs v. Armontrout, 943 F.2d 26, 27 (8th Cir. 1991), cert. denied, 112 S.Ct. 1212 (1991) ("We have recognized that the intentional placing of prisoners in dangerous surroundings or the manifestation of deliberate indifference to their safety violates the Eighth Amendment"); Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1st Cir. 1988), cert. denied, 488 U.S. 823 (1988) ("When prison officials intentionally place prisoners in dangerous surroundings, ... or when they are 'deliberately indifferent' either to prisoners' health or safety, they violate the

(continued...)

The "safety" required by the Eighth Amendment must necessarily include protection from foreseeable risks of harm that have not yet come to pass. Indeed, the very definition of "safety" includes freedom from risk of harm as yet unrealized. See, e.g., Webster's Third New International Dictionary Unabridged (1981) ("freedom from exposure to danger;" "the quality or state of not presenting risks"); American Heritage Dictionary, Second College Edition (1985) ("freedom from danger, risk, or injury").

In Rhodes v. Chapman, 452 U.S. 337 (1981), this Court cited with approval four lower court decisions finding prison conditions to be violative of the Constitution. Id. at 352 n. 17. These cases

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[8](...continued)
Constitution"); Hoptowit v. Spellman, 753 F.2d 779, 784 (9th Cir. 1985) ("[T]he Eighth Amendment entitles inmates in a penal institution to an adequate level of personal safety. This is required because inmates, by reason of their confinement, cannot provide for their own safety").

make clear that the Eighth Amendment protects prisoners from substantial risk of serious harm. For example, in Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981), the court of appeals affirmed the district court's finding that prison officials' failure to provide adequate protection from assault violated the Eighth Amendment, noting that a prisoner "does not need to wait until he is actually assaulted before obtaining relief." Id. at 572. Similarly, in Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974), the court of appeals affirmed a finding of constitutionally inadequate medical care. In reviewing the facts found by the district court, the court of appeals noted that "[s]ome inmates with serious contagious diseases are allowed to mingle with the general prison population," id. at 1300, although there was apparently no evidence that this had actually resulted in the transmission of disease. See also Morgan

v. District of Columbia, 824 F.2d 1049, 1058 (D.C. Cir. 1987), cited with approval in Wilson v. Seiter, 111 S.Ct. at 2327 (deliberate indifference can be shown by "an obvious unreasonable risk of violent harm").

The United States asserts, without citation to authority from this Court, that the Eighth Amendment "does not, at least as a general rule, apply to potential and distant harms, such as the possibility that an inmate might experience adverse health effects in the future as a result of his exposure to ETS while in prison." Brief of United States at 10.[9] This position, if adopted by this Court, would allow officials to expose prisoners to any risk of illness, injury, or death, without running afoul of

[9] The amici states are more explicit, asserting that "[t]he mere possibility that forced exposure to levels of secondhand smoke will lead to cancer or other disease at some unspecified time in the future does not satisfy the objective component of a cruel and unusual punishment claim." Brief of Hawaii, et al., at 8.

the Constitution until the moment when the threatened harm actually occurs and becomes detectable.

For example, in Hutto v. Finney, 437 U.S. 678 (1978), this Court described conditions for prisoners in punitive isolation in the Arkansas penal system. The Court noted that "[a]lthough some prisoners suffered from infectious diseases such as hepatitis and venereal disease, mattresses were removed and jumbled together each morning, then returned to the cells at random in the evening." Id. at 682-683. The harm threatened by this practice was only "potential;" indeed, there was apparently no evidence in the record that any identifiable prisoner had actually contracted a disease as a result of this practice. However, this fact did not prevent the Court from approving the district court's conclusion that conditions in the isolation cells constituted

cruel and unusual punishment. Id. at 687.[10]

Under the regime proposed by the United States, prison officials could decide that, although dangerous levels of asbestos existed in a prison, removing it would be too expensive, and so it would be left in place. The harm would be "potential," in that officials would not know to a certainty that any given prisoner would actually develop lung disease, and it would be "distant," in that the disease might take years or even decades to develop and become detectable. See Borel v. Fibreboard Paper Products Corporation, 493 F.2d 1076, 1083 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974) (asbestosis generally does not manifest itself until ten to twenty-five years after exposure; mesothelioma, a form of lung cancer

[10] The United States appears to agree that this practice would violate the Constitution, even in the absence of evidence that disease had actually been transmitted. Brief of United States at 19.

caused by exposure to asbestos, has a similarly long latency period between initial contact and apparent effect). Thus, such conduct by prison officials would not be actionable until a prisoner actually became ill. But see Powell v. Lennon, 914 F.2d 1459, 1463, 1464 n. 10 (11th Cir. 1990) (allegation that prisoner had been exposed to asbestos in his cell states Eighth Amendment claim, even in the absence of present symptoms); Clark v. Taylor, 710 F.2d 4, 14 (1st Cir. 1983) (prisoner's rights violated by compelled exposure to chemical that increased risk of developing bladder cancer after a latency period of fourteen to thirty years).

Similarly, prison officials would be under no duty to remedy conditions that presented a serious risk of fire, as long as no fire had yet occurred. Because even the most egregious fire safety hazards are only a "potential" harm until the moment the

prison starts to burn, the Eighth Amendment would impose no obligations on prison officials until that time. But see Hoptowit v. Spellman, 753 F.2d at 784 ("Prisoners have the right not to be subjected to the unreasonable threat of injury or death by fire and need not wait until actual casualties occur in order to obtain relief from such conditions"); cf. Dimarzo v. Cahill, 575 F.2d 15, 18 (1st Cir. 1978), cert. denied sub nom. Hall v. Dimarzo, 439 U.S. 927 (1978) ("One need not wait for the conflagration before concluding that a real and present threat exists") (footnote omitted) (holding that prisoners had standing to challenge fire safety deficiencies even absent proof that they would inevitably suffer injury or death from fire).

Prison officials might decide, as a cost-saving measure, to use a single needle to vaccinate a number of prisoners, in spite of the knowledge that some of the prisoners

are HIV-positive, and that this practice poses a substantial risk of transmitting the virus.[11] Again the risk would be only potential, because it may happen that no prisoners become infected, and the threatened harm would be distant, in that if a prisoner did become infected, he or she might not become symptomatic for a number of years. See National Academy of Sciences, Confronting AIDS--Directions for Public Health, Health Care, and Research 6 (1986). Thus, under the rule proposed by the United States, such a practice would be immune to constitutional challenge. Indeed, a refusal by prison officials to take any steps to prevent or control tuberculosis or any other infectious disease would not be actionable until some prisoners became infected and developed

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[11] As of 1987, the frequency of transmission of HIV to health care workers via an accidental needle stick with HIV-infected blood was 0.5%. National Institute of Justice, AIDS in Correctional Facilities: Issues & Options 9 (1988).

symptoms. But see Hill v. Marshall, 962 F.2d 1209, 1215 (6th Cir. 1992) (improper medical treatment that increased prisoner's future risk of developing active tuberculosis violated Eighth Amendment, although prisoner had not developed the disease by the time of trial); Tillery v. Owens, 907 F.2d 418, 428 (3d Cir. 1990) ("We find nothing in the Supreme Court's relevant jurisprudence that suggests that conditions as deplorable as those at SCIP may not be held to fall below constitutional standards merely because there has not yet been an epidemic of typhoid fever, an outbreak of AIDS, a deadly fire, or a prison riot"); Glick v. Henderson, 855 F.2d 536, 539-540 (8th Cir. 1988) (prisoner "could have a colorable claim under §1983 if he could show that there is a pervasive risk of harm to inmates of contracting the AIDS virus and if there is a failure of prison officials to reasonably respond to that risk") (internal quotation marks, citation

omitted).[12]

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[12] The lower courts have consistently held that defects in medical care may be remedied before the threatened harm comes to pass. See, e.g., Todaro v. Ward, 565 F.2d 48, 51 (2d Cir. 1977) ("The [district] judge cogently commented that he 'need not wait until an epileptic chokes to death on her tongue,' in the absence of proof that such a catastrophe had actually occurred. He held correctly, we believe, that these deficiencies [in medical care] subjected inmates to grave and unnecessary risks"); Palmigiano v. Garrahy, 443 F. Supp. 956, 973 (D.R.I. 1977), aff'd, 616 F.2d 598 (1st Cir. 1980), cert. denied, 449 U.S. 839 (1980) ("[T]he Court would be remiss in its duty were it to wait until an inmate bleeds to death, or suffers a heart attack which defendants are unequipped to diagnose or treat in an emergency, before it acts" to correct deficiencies in medical care).

The courts of appeals have recognized that other conditions of confinement may violate the Eighth Amendment, although the harm they cause is both "potential" and "distant." See, e.g., Hoptowit, 753 F.2d at 783 (inadequate lighting); Bono v. Saxbe, 620 F.2d 609, 617 n. 12 (7th Cir. 1980) (same); Divers v. Department of Corrections, 921 F.2d 191, 194 (8th Cir. 1990) (lack of exercise); Davenport v. DeRobertis, 844 F.2d 1310, 1315-16 (7th Cir. 1988), cert. denied, 488 U.S. 908 (1988) (same); French v. Owens, 777 F.2d 1250, 1255 (7th Cir. 1985) (same); Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979) (same). In Wilson v. Seiter, 111 S.Ct. at 2327, this Court confirmed that exercise is a "human need" and that deprivation of exercise can violate the Eighth Amendment, citing Spain with approval.

B. The Eighth Amendment Protects Prisoners from Substantial Risks of Serious Harm

Of course prison officials are not required to abate every conceivable risk of harm to prisoners. But the Eighth Amendment is violated when prisoners are subjected to a substantial risk of serious harm. In this analysis, both the likelihood and the gravity of the threatened harm must be taken into account. Thus, for example, conditions that presented a ten per cent chance that a prisoner would develop athlete's foot would not violate the Eighth Amendment, while conditions that presented an equivalent risk of becoming infected with HIV would be unconstitutional. Similarly, a very slight risk of even catastrophic harm would not violate the Eighth Amendment (for example, failing to earthquake-proof a prison located in an area that has never experienced an earthquake).

The standard articulated by the court of appeals--"unreasonable risk of harm to ... health"--is fully consistent with this analysis. However, if this Court sets forth a different legal standard, this case should be remanded to the district court to allow that court to apply the standard to the evidence regarding the long-term risks of exposure to ETS.

IV. THE FACT THAT NON-INCARCERATED PERSONS ARE SOMETIMES EXPOSED TO ETS IS IRRELEVANT TO RESPONDENT'S EIGHTH AMENDMENT CLAIM

Petitioners place great emphasis on the fact that "unincarcerated citizens have no constitutional protection from exposure to ETS." Brief of petitioners at 26; see also id. at 29-31. This, they suggest, precludes a holding that exposing prisoners to ETS can violate the Constitution.

This argument fails to recognize that prisoners and non-prisoners are not similarly situated, and that the Eighth Amendment

confers certain rights upon the former that do not extend to the latter. For example, while "[t]he Constitution imposes no obligation on the States to pay ... any of the medical expenses of indigents," Maher v. Roe, 432 U.S. 464, 469 (1977) (footnote omitted), "the Eighth Amendment's prohibition against cruel and unusual punishment ... requires the State to provide adequate medical care to incarcerated prisoners." DeShaney v. Winnebago County DSS, 109 S.Ct. 998, 1005 (1989). Thus, while it is certainly true that many non-incarcerated persons are denied access to medical care, prison officials may not use this fact to justify refusing medical care to the prisoners in their custody. Similarly, although the state has no constitutional duty to protect non-incarcerated persons from private violence, DeShaney, 109 S.Ct. at 1004, or to provide such persons with adequate housing, Lindsey v. Normet, 405 U.S.

56, 74 (1972), the state unquestionably does have such a duty with regard to prisoners. DeShaney, 109 S.Ct. at 1005-1006 (state must provide "basic human needs--e.g., food, clothing, shelter, medical care, and reasonable safety").

Nor is it relevant that many non-prisoners voluntarily submit to ETS exposure in restaurants and other places. It is clear that such persons cannot, by their own voluntary conduct, waive the rights of prisoners not to be exposed to conditions that seriously threaten their health and safety. For example, many persons voluntarily drink dangerous amounts of alcohol, and others engage in sexual practices that place them at high risk for HIV infection, but petitioners would presumably not argue that prisoners could be compelled to engage in these behaviors.

> [T]he fact that people who are free to do so choose to expose themselves to serious health risks cannot justify the arbitrary,

> involuntary exposure of a prisoner to those risks. It would be absurd to suggest that because people ride with drunk drivers, practice bungee jumping, sky-dive, and ride motorcycles without helmets, a prison official could therefore require an inmate to do so over his objection.

Clemmons v. Bohannon, 956 F.2d 1523, 1533 n. 3 (10th Cir. 1992) (en banc) (Seymour, J., dissenting).[13]

Moreover, there is a significant difference between occasional, fleeting, voluntary exposure to ETS in a restaurant, and the degree of exposure at issue in this case. It was not disputed in the court of appeals, and it is apparently not disputed in this Court, that respondent was confined to a poorly ventilated six-foot by eight-foot cell with a prisoner who smoked five packs of cigarettes a day, and that there was no

[13] Contrary to the assertion of the United States (brief of United States at 10, 20), it is of no relevance that smoking is a lawful activity, as are all the activities enumerated in the preceding paragraph.

restriction on smoking in the prison except in the infirmary and the culinary. McKinney, 924 F.2d at 1507. There is no reason to believe either that this extreme level of exposure is voluntarily tolerated by non-prisoners, or that it is within society's expectations of appropriate conditions for incarcerated persons.[14]

[14] It is difficult to discern the relevance of the observation by the United States that "[t]wo hundred years ago, many of our most revered founding fathers were tobacco farmers." Brief of United States at 20, quoting Caldwell v. Quinlan, 729 F. Supp. 4, 6 (D.D.C. 1990), aff'd, 923 F.2d 200 (D.C. Cir. 1990), cert. denied, 112 S.Ct. 295 (1991). Certainly the fact that many respectable persons are involved in the manufacture of asbestos and pesticides does not mean that prisoners can be exposed to limitless quantities of those substances without implicating the Eighth Amendment. See Powell v. Lennon, 914 F.2d 1459 (11th Cir. 1990) (exposure of prisoner to asbestos may violate Eighth Amendment); Johnson-El v. Schoemehl, 878 F.2d 1043 (8th Cir. 1989) (exposure of prisoners to pesticides may violate Constitution).

V. PETITIONERS AND THEIR AMICI EXAGGERATE THE EFFECTS OF AFFIRMING THE DECISION BELOW

Amici states and the United States predict dire consequences if the decision below is affirmed. The United States fears that restrictions on smoking by prisoners could "increase the likelihood of unrest and antisocial behavior...." Brief of United States at 23. Amici states refer to "the unrest flat bans on smoking produce in the prison environment," brief of Hawaii, et al., at 11, and predict that such a ban would require "more prison guards and other staff to deal with the likely increase in prison unrest." Id. at 2.

However, these predictions appear to have no basis in fact. Although numerous county and state corrections departments, including the Nevada Department of Prisons (see brief of United States, Appendix), as well as the federal Bureau of Prisons (id.

at 15-16), have restricted smoking by prisoners, amici are unable to point to a single incident in which such restrictions have been implicated in prison violence or unrest.

Such unadorned speculation is entitled to no weight:

> It is the business of prison officials, of course, to maintain order within their institutions. But this fact does not support a claim that every step taken to protect constitutional rights of prisoners will lead to a breakdown in institutional discipline or security. Routine and automatic arguments to this effect have been made before and have been rejected by this Court.

Cleavinger v. Saxner, 474 U.S. 193, 207 (1985).

Amici states also fear that affirmance of the decision below will open a "Pandora's box" of "endless numbers of complaints over environmental, nutritional, or programmatic conditions at the Nation's prisons...." Brief of Hawaii, et al., at 8-9; see also

brief of United States at 21 n.16.[15] However, such concerns, mechanically recited by government officials whenever prisoners' rights are at issue before this Court, are exaggerated. The court of appeals held only that "it is cruel and unusual punishment to house a prisoner in an environment that exposes him to levels of ETS that pose an unreasonable risk of harming his health." McKinney, 959 F.2d at 854. That court concluded that respondent stated a valid claim based on the specific facts of his case--confinement in a poorly ventilated six-

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[15] For example, amici states express fear that "[e]verywhere, prison diets ... would come under scrutiny in federal court under the guise of claims challenging conditions as breaching the Eighth Amendment." Brief of Hawaii, et al., at 9. However, this Court has already recognized that providing prisoners a nutritionally inadequate diet can violate the Eighth Amendment. Hutto v. Finney, 437 U.S. 678, 683, 686-687 (1978). See also Campbell v. Cauthron, 623 F.2d 503, 508 (8th Cir. 1980) (jail's daily diet of two sweet rolls, two frozen dinners, and coffee was nutritionally inadequate and violated constitutional standards).

foot by eight-foot cell with a prisoner who smoked five packs of cigarettes a day, in a prison where smoking was virtually unregulated. See McKinney, 924 F.2d at 1507. It does not follow that other prisoners alleging exposure to ETS under different circumstances would be able to state a claim capable of surviving a motion for judgment on the pleadings.[16]

This Court has established a stringent standard for prisoners seeking to show that the conditions of their confinement violate the Eighth Amendment. Such prisoners must show not only that those conditions deny them "the minimal civilized measure of life's necessities," Rhodes v. Chapman, 452 U.S. at

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[16] This Court has made clear that conditions of confinement that might otherwise violate the Eighth Amendment do not do so when prisoners are exposed to them only to a minimal extent. See, e.g., Hutto v. Finney, 437 U.S. at 686-687 ("[a] filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months").

347, but also that prison officials, in allowing those conditions to exist, acted with "deliberate indifference." Wilson, 111 S.Ct. at 2326-2327. This high standard, combined with the availability of judgment on the pleadings and summary judgment, makes extremely unlikely the "Pandora's box" feared by amici states.

CONCLUSION

For all the reasons set forth herein, the judgment of the court of appeals should be affirmed. Alternatively, the writ of certiorari should be dismissed as improvidently granted, or the judgment below vacated and the case remanded for the court of appeals to consider the possible effect of intervening factual developments.

Respectfully submitted,

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October, 1992